

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

CLINGMAN & HANGER MANAGEMENT	§ CASE NO. 4:21-CV-02698
ASSOCIATES, LLC	§ HOUSTON, TEXAS
	§ WEDNESDAY,
VERSUS	§ JUNE 15, 2022
	§
KAY RIECK, ET AL	§ 1:30 P.M. TO 4:28 P.M.

MOTION HEARING DAY TWO

BEFORE THE HONORABLE CHARLES ESKRIDGE  
UNITED STATES DISTRICT JUDGE

APPEARANCES:	SEE NEXT PAGE
CASE MANAGER:	JENNELLE GONZALEZ
COURT RECORDER:	SHANNON HOLDEN

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1                   HOUSTON, TEXAS; WEDNESDAY, JUNE 16, 2022; 1:30 P.M.

2                   COURT SECURITY OFFICER: All rise. The United  
3 States District Court for the Southern District of Texas is  
4 now in session.

5                   The Honorable Charles Eskridge presiding. God save  
6 these United States and this Honorable Court.

7                   THE COURT: Thank you. Everyone can be seated.

8                   All right. Continuing on with our hearing from  
9 yesterday in Clingman and Hanger Management Associates versus  
10 Kay Rieck, et al, 21-2698. So we had the same appearances to  
11 start.

12                  Do we have the same Court reporter as yesterday?

13                  THE CLERK: No, Your Honor.

14                  THE COURT: No? All right. Can I get the  
15 appearances for the Record then?

16                  MR. SAMET: Good afternoon. Again, for the  
17 Plaintiff, Avery Samet and Robert Corn.

18                  THE COURT: Thank you.

19                  And for various Defendants?

20                  MR. RYDER: George Ryder and Jordan Leu for  
21 Defendants Stone Pigman Walther Wittmann L.L.C.

22                  THE COURT: All right.

23                  MR. REASONER: Barrett Reasoner and Caitlyn Cowan  
24 for David Hryck and Theodor Van Stephoudt.

25                  THE COURT: All right.

1 MR. ROSEN: Good afternoon, Your Honor. Kevin Rosen  
2 on behalf of Defendant Reed Smith.

3 THE COURT: Thank you, Mr. Rosen.

4 MR. FOGLER: Murray Fogler for Tony Nunes.

5 THE COURT: All right. Thank you, Mr. Fogler.

6 And I'll, for anybody else beyond the law -- lawyers  
7 and law firms, we'll swap out for whatever's left and get  
8 further appearances, I think once we move to that set of  
9 issues.

10 (En masse) Yes, Your Honor.

11 THE COURT: Is everybody on the present set? Okay.

12 All right, thanks everyone.

13 A couple of minor matters. My law clerk and I were  
14 looking.

15 Mr. Hryck, how is this spelled, because it seems  
16 like it's spelled throughout the Record as H-R-Y-C-K.

17 MS. COWAN: That's correct.

18 THE COURT: That is? But it's pronounced as if it's  
19 spelled H-R-C-Y-K.

20 MS. COWAN: It's pronounced as if it's the word her,  
21 H-E-R dash sick --

22 THE COURT: Hrcyk. Okay, all right. So I just want  
23 to make sure. I just was wondering whether anything on the  
24 docket that would be --

25 MR. BARRETT: In our defense, Your Honor, I think I

1 erroneously gave the Court the phonetic spelling as opposed  
2 to the actual --

3 THE COURT: Yeah, I just wanted to be clear.  
4 Because actually we had started to correct some things on the  
5 Record on the docket. I was like, no, no, no, let's make  
6 sure, because we were looking at -- anyways, I think we have  
7 it figured out now how it's spelled and how it is said.

8 There was also, just filed a supplement to  
9 Mr. Rieck's motion to dismiss about this service issue.

10 Mr. Samet, have you had a chance to see that or look  
11 at it at all?

12 MR. SAMET: I have had a chance to see it and look  
13 at it briefly this morning.

14 THE COURT: And so I don't know -- I don't know that  
15 it changes my ruling or anything, but I think that it goes  
16 towards, are you trying to effect some other type of service,  
17 or do you think that the service that you've made is  
18 sufficient?

19 Obviously I was going to give you a chance to  
20 respond on what's going on. But I've sort of thought if  
21 you're like, well, we're going to be perfecting service in a  
22 different way anyway, then we don't have to worry about this  
23 at all.

24 MR. SAMET: That is what -- I have a lot to say  
25 about this.

1 THE COURT: All right.

2 MR. SAMET: But that is one of my points, which is  
3 we have a section of the brief we filed back in September --  
4 October that says this Court has authority to designate and  
5 serve through his lawyer.

6 So in some sense it is -- I don't know that's  
7 particularly relevant --

8 THE COURT: All right.

9 MR. SAMET: -- although I do have a lot of say if  
10 Your Honor wants to hear it. You may not.

11 THE COURT: We'll let you know whether you need to  
12 file anything further. But with this in mind, we'll take a  
13 look at what further needs to be said. I'll issue some sort  
14 of further writing on that disbursing of it. Okay? Or  
15 directing you to let me know more.

16 All right. So let's pick back up where we were  
17 yesterday. And let me give my outline here. My materials are  
18 growing.

19 Jacob, where was that -- here, I've got it. My  
20 tracking sheet there.

21 All right. So we were on to the breach of fiduciary  
22 duty claims yesterday. And so, let's pick up with Mr. Hrcyk  
23 as to failure to plead sufficiently fiduciary duty.

24 MR. REASONER: Thank you, Your Honor.

25 THE COURT: Yes.

1 MR. REASONER: I would just like to highlight two  
2 points for -- oh, I'm sorry, Barrett Reasoner for David Hryck.

3 I'd just like to highlight for the Court two points  
4 there. First, Your Honor, on the duty piece. All of the  
5 allegations against Mr. Hryck, for breach of fiduciary duties,  
6 span from the time frame of February of 2016 to April of that  
7 year.

8 The engagement letter in question is for December of  
9 2017, but effective June of 2017. So they have not pled an  
10 attorney-client relationship between Mr. Hryck and Fury during  
11 the relevant time period that they've talked about misconduct  
12 allegedly taking place. So that is -- we think that's a fatal  
13 deficiency in the pleading in that regard. But second --

14 THE COURT: Go ahead, go ahead.

15 MR. REASONER: Secondly, Your Honor, when you go to  
16 the substance of the breaches that are alleged, and I think  
17 Mr. Rosen will talk in a bit about the showing an improper  
18 benefit.

19 THE COURT: Right.

20 MR. REASONER: Here, the allegation is that he  
21 drafted a profit-sharing agreement and that he drafted a trust  
22 agreement, which contemplated that he might be a trustee of an  
23 entity. Again, neither of those alleged that there was any  
24 improper benefit to Mr. Hryck from that.

25 And we talked yesterday about the fact that there



1 was no allegation of any -- you know, beyond attorneys' fees,  
2 that there were any involvement of Mr. Hryck as an investor in  
3 any of these things or receiving any under-the-table payment,  
4 any sort of untoward activity.

5 So, they're not in a position where they can fairly  
6 bring a breach of fiduciary duty claim against Mr. Hryck when  
7 the law says all you have, if you do not show any proper  
8 benefit, is a legal malpractice claim --

9 THE COURT: And is it -- so some of the allegations  
10 are, as to Mr. Hryck having some conflicts of interests as to  
11 various entities that he was representing, correct?

12 MR. REASONER: I --

13 THE COURT: I'm not asking you to agree that that is  
14 an established state of facts, but that there are allegations  
15 about that.

16 MR. REASONER: I think they're trying to suggest  
17 that through some other entities that he was representing,  
18 there was a conflict with Fury.

19 THE COURT: Okay. And so if in that relationship,  
20 it's in a conflict situation, let's then suppose that as to  
21 the entities which are creating conflict of interest, there's  
22 what would be perceived as an improper benefit to one of them  
23 at the expense of another.

24 Assuming that state of facts is proven, is that  
25 enough to meet the improper benefit or is it have to be

1       improper benefit to Mr. Hryck himself?

2               MR. REASONER: So my understanding is, it has to be  
3       to Mr. Hryck. They have suggested that there is some state of  
4       affairs where you can say trying to benefit one client versus  
5       another is an improper benefit. We've not seen authority for  
6       that, Your Honor.

7               And, frankly, if you look at the cases that are  
8       cited in that section of their brief, one of them -- the only  
9       one that involves an attorney is *Brenner v. Centurion*  
10      *Logistics*, was a situation where the Court found that  
11      forfeiture of fees was not proper for, among other reasons,  
12      the fact that the Plaintiff was not able to show that there  
13      was any benefit, any improper benefit from the alleged  
14      breaches.

15              And so, the situation that the Court hypothesizes,  
16      and that they're trying to suggest, I think in their  
17      arguments, is not supported by law that we have seen. And  
18      again, they've not alleged that Mr. Hryck received anything  
19      other than -- well, fees were paid to Reed Smith, and he was a  
20      partner there.

21              THE COURT: And then, so further as to just to make  
22      sure I hear everything from you on this point that I need to.

23              Anything further to say in terms of your  
24      representation of Reed Smith on that? I'm very clear about  
25      what you say Mr. Hryck. Is there anything else as to Reed

1 Smith?

2 MR. REASONER: And Mr. Rosen is representing Reed  
3 Smith.

4 THE COURT: Oh, okay.

5 MR. REASONER: So I was just --

6 THE COURT: Right, right, right, okay.

7 MR. REASONER: -- about that relationship.

8 THE COURT: Got it, got it, got it. I forgot about  
9 that. Okay.

10 Yeah. Because you also have Van Stephoudt, but  
11 there's not an argument to that.

12 MR. REASONER: Well, yes. The only -- Your Honor,  
13 the only for Mr. Van Stephoudt, whom they alleged was for a  
14 period of time, president, --

15 THE COURT: Yeah.

16 MR. REASONER: -- he falls squarely within that LLC  
17 agreement disclaimer that was addressed --

18 THE COURT: That we took yesterday. Yeah. Okay.  
19 Thank you very much.

20 MR. REASONER: Thank you, Your Honor.

21 THE COURT: Does it make more -- from the  
22 Defendants, does it make more sense for me to talk to  
23 Mr. Samet, just about Mr. Hryck at this point, or should we  
24 get the positions for Mr. Nunes, Reed Smith, and Stone Pigman  
25 on this before we turn to him?

1 I don't know if you-all are saying kind of the same  
2 thing or you've got different aspects?

3 MR. ROSEN: Kevin Rosen for Reed Smith.

4 THE COURT: Let me hear at least for Reed Smith.  
5 Anything for that you want to say on the improper benefit  
6 point?

7 And then I think, Mr. Samet, I'll take -- have you  
8 respond there. And the we will do Nunes and Stone Pigman  
9 together. Okay?

10 All right. Go ahead.

11 MR. ROSEN: Thank you, Your Honor.

12 And that's correct. My focus is going to be on  
13 improper benefit issue --

14 THE COURT: Yeah.

15 MR. ROSEN: -- in connection with the direct breach  
16 of fiduciary duty claim against Reed Smith.

17 I think -- there's some things that we can put aside  
18 because they're not really in dispute. I don't think it's  
19 really in dispute that attorneys' fees alone are not enough  
20 under Texas law to support breach of fiduciary duty claim.

21 I don't think it's in dispute that the improper  
22 benefit question is a question of law, that the Court can  
23 decide. That's specifically stated, for example, in the  
24 *Juan Pack* (phonetic) case that we cited.

25 And I also don't think it's disputed that simply

1       because there's an allegation of something that one might  
2       consider a breach of fiduciary duty, such as a conflict, or  
3       what have you, that that's enough under Texas law, the anti-  
4       fracturing doctrine, to support a breach of fiduciary duty  
5       cause of action.

6               I don't think any of that's in dispute. If it turns  
7       out it is, then I'll obviously address it.

8               And I also don't think -- well, I guess this is in  
9       dispute.

10              If you look at the opposition brief, not having  
11       disputed any of that, and acknowledging improper benefit  
12       doctrine, the sum total of the opposition to the applicability  
13       of the doctrine here, the improper benefit is, well, no, no,  
14       no, we're talking about disloyalty.

15              THE COURT: Right.

16              MR. ROSEN: But the problem is every single case  
17       that enforces the improper benefits doctrine describes the  
18       allegations as disloyalty.

19              So just because there's an allegation of disloyalty,  
20       does not in any way change the analysis. And I'm going to  
21       give you some specifics, because I think it's one thing to  
22       listen to argument, it's another thing to see what the case is  
23       saying.

24              I just don't spend quite a lot of time on case law.  
25       I obviously presume and expect that the Court's read it. But

1 I do think some of the points in the case law to specifically  
2 call out, because there's just a few cases that I think are  
3 the most relevant here are useful.

4 I think from our perspective, you start, it's useful  
5 to start with the *Stanford Ponzi Scheme* (phonetic) case of  
6 Northern District of Texas. And there the Court -- you know,  
7 there were allegations of how there was with breach of  
8 integrity and fidelity, because fidelity is another word for  
9 loyalty.

10 And there were -- there was a specific allegation  
11 that the lawyers had an expectation of continuing legal fees  
12 from another entity.

13 Again, very much similar to what we've seen here.  
14 And the Court there addressed a number of the cases that had  
15 been cited by the parties. And at the end of the day, where I  
16 think it's most relevant to focus on that decision, and I'm  
17 at, I believe I'm at page 7 from the Westlaw cite, is the  
18 following statement in that case, I've going to read it twice,  
19 once in terms of the context of that case, and once in terms  
20 of this case.

21 The Court said this in referring to the one, the  
22 *Juan Pack* case that I had said it before and how that was,  
23 analogous.

24 The Plaintiffs alleged Defendants subordinated the  
25 interest of one client, the Stanford entities, to those of

1 another client, Mr. Stanford, in order to ensure continued  
2 receipt of business and legal fees from the latter.

3 Now I'm going to put that in our case.

4 Plaintiffs alleged that Defendant, Reed Smith,  
5 subordinates -- subordinated the interests of one client,  
6 Fury, the Fury entities, to those of another client, Mr. Reick  
7 and others, in order to ensure continued receipt of business  
8 and legal fees from the latter.

9 That is their argument. And that argument was  
10 squarely rejected by the *Stanford* case.

11 THE COURT: Who was the judge of that case?

12 MR. ROSEN: Judge Godwin.

13 THE COURT: Godwin, okay.

14 MR. ROSEN: And I think the Court there did an  
15 admirable job in sort of collecting a lot of the most relevant  
16 authorities that are applicable.

17 But it's not limited to that case. It's also, you  
18 can see these points in appellate decisions in Texas. The  
19 *Murphy* case is another good example. I mean there -- and  
20 consider the allegations. These are specifically called out.  
21 The Court listed 11 elements or 11 allegations that supported  
22 the Plaintiff's breach of fiduciary duty claim there.

23 Consider some of these allegations, which ultimately  
24 the Court said do not support breach fiduciary duty claim. It  
25 was an allegation of -- conflict of interest, in the language

1 of the Court.

2 Quoting from the Plaintiff: Violation of duties of  
3 loyalty, there was an allegation of misrepresentation. There  
4 was an allegation of self dealing -- I'll come back to that  
5 because certain types of self dealing are used in Court, in  
6 terms of stealing.

7 But there was an allegation of self dealing. There  
8 was an allegation that the lawyers chose their own interests  
9 in obtaining a multimillion dollar fee, in one case by taking  
10 action in that case, it was detrimental to their clients in  
11 another case. And there's allegations about how the lawyers  
12 failed to represent the Plaintiff with undivided loyalty.

13 Over and over again, in that case, there are -- or  
14 were allegations more extreme, if you will, than the simple  
15 statement in the opposition brief that this is about a loyalty  
16 case. And nevertheless, and in the case was basically about  
17 how one lawyer had represented two different clients in two  
18 different cases. And then when there was a counterclaim in  
19 the second case, abandoned the client in order to preserve the  
20 situation in the first case where the lawyer had earned the  
21 fee.

22 Clearly allegations of conflict of interest.  
23 Clearly allegations that the lawyer wanted to benefit in terms  
24 of the fee he'd earned in another base. And nevertheless, the  
25 Court said that is not what Texas law considers to be an



1 actionable breach of fiduciary duty, as opposed to allegations  
2 that would fit within a negligence cause of action.

3 So again, the important point here is, it's not  
4 about whether something is arguably a breach of fiduciary  
5 duty, because under Texas law, a breach of fiduciary duty  
6 under the anti-fraction rule fits within a negligence cause of  
7 action, unless there is a improper benefit.

8 So, you know, and I can go on. I mentioned the *Juan*  
9 *Pack* case. That would be one more that I would suggest that  
10 the Court look at it in particular. And then even that case  
11 talks about conflict of interest. And that's one of the cases  
12 that in the opposition brief, the Plaintiffs point the Court  
13 to. But in *Beck*, after looking at a number of these other  
14 cases as well, *Beck* rejected the very argument that Plaintiffs  
15 are asserting.

16 And the only other case that the Plaintiff provided,  
17 the *First Pentecostal Union* case, that was a case where the  
18 lawyer stole a million dollars from his client. That is a  
19 completely different scenario than the type of theory and  
20 allegations that are being alleged here.

21 And so, in light of the distinction that Texas law  
22 draws between what constitutes an improper benefit to support  
23 a cause of action for breach of fiduciary duty versus what  
24 breaches of fiduciary duty must be alleged in a cause of  
25 action for negligence.

1           This case is easily on the side of the negligence  
2           cause of action. There really aren't any facts beyond any of  
3           the cases that I cited, all of which say that is not  
4           sufficient to support breach of fiduciary duty claim.

5           And that, in essence, Your Honor, is our point. And  
6           as I say, those are the cases that I think are most helpful in  
7           addressing the type of allegations here in response to the  
8           (indiscernible).

9           THE COURT: Okay.

10          MR. ROSEN: So unless you have any questions --

11          THE COURT: No, I don't. Thanks, it's very helpful.

12          MR. ROSEN: Thank you.

13          THE COURT: Mr. Samet.

14          MR. SAMET: Thank you, Your Honor. Mr. Corn, is  
15          going to address this issue.

16          THE COURT: Okay, great.

17          MR. CORN: Robert Corn for the Plaintiff.

18          Judge, I want to back up just a little bit here and  
19          talk about why it is there is an issue and why this  
20          terminology comes up with this improper benefit.

21          It goes back to malpractice actions in Texas and the  
22          general concept that malpractice action can't be fractured in  
23          other claims. It's that fundamental, that old fundamental  
24          concept. And you can't take what is generally a malpractice  
25          claim and break it down into breach of fiduciary duty and

1 fraud and whatever else.

2 And so Courts have, from time-to-time, looked at  
3 that issue. And as a tool to try to evaluate the claims, one  
4 of the things the Courts look for is: Was there an improper  
5 benefit to the lawyer in what is fundamentally a negligence-  
6 based claim. A claim that is about the quality of the  
7 lawyer's services.

8 If you look at the cases that the Defendants are  
9 citing, those are generally -- for example, the *Juan Pack*  
10 case, there was another one they cited, those are cases  
11 evaluating a negligence-based malpractice claim to see if the  
12 breach of fiduciary duty claim could be alleged as well,  
13 whether that's a viable claim, in addition to the malpractice  
14 claim within a quality based controversy.

15 That's not what's going on here. That's not what  
16 this case is about. This case is about the disloyalty. We  
17 have alleged pages and pages in detail with allegations of the  
18 conduct of these lawyers doing work for everybody other than  
19 Fury, and for the benefit of everybody other than Fury,  
20 Mr. Rieck's other companies, Mr. Rieck. The middleman  
21 entities, they were going to syphon assets out of Fury,  
22 creating all this legal work, all of that is disloyal to Fury.

23 Fury even paid for that work. So what the cases are  
24 about that we cited, we cited *Burr versus Arce* and its  
25 prodigy, and those cases are about lawyers who have been

1 disloyal and what the remedies are with respect to that sort  
2 of conduct. And I think we've all become familiar with the  
3 concept that there can be fee forfeiture, and there can be  
4 other harm and damages that result from the disloyalty by the  
5 lawyers.

6 And so, that's the line of cases that we're talking  
7 about. And it's the compensation that they received, that's  
8 an improper benefit. And there's the funds that they've  
9 received as a result of the conduct, for example, for  
10 representation of others that they preferred. And we've cited  
11 cases for the proposition that those sorts of conflicts of  
12 that sort of behavior is disloyal and it's a breach of  
13 fiduciary duty. So I can turn as well --

14 THE COURT: What's your leading case?

15 MR. CORN: Well, it would be *Burroughs*, which is,  
16 which is one of the original cases.

17 THE COURT: Uh-huh.

18 MR. CORN: It would be the *Pentecostal* case. It  
19 would be -- and we've cited those. It's *First United*  
20 *Pentecostal Church of Beaumont versus Parker*. There is also  
21 the *ERI Consulting versus Swania* (phonetic) case out of the  
22 Supreme Court that we've cited, that also recognizes of these  
23 concepts.

24 And another thing that's important to look at is,  
25 these concepts arise out of the old *Kinsback Poodle* (phonetic)

1 case, with respect to the agent's breach of fiduciary duty.

2 THE COURT: Uh-huh.

3 MR. CORN: And are grounded in that originally into  
4 *Burrow versus Arce* and then into these other cases.

5 And so, that's the, that's the line of authority  
6 that we're looking at as support for the proposition that is  
7 disloyal behavior.

8 THE COURT: Uh-huh.

9 MR. CORN: That is what's at issue. And so there is  
10 the claim then of sort of an independent breach of fiduciary  
11 duty claim.

12 THE COURT: Okay.

13 MR. CORN: Independent from the quality based sorts  
14 of claims.

15 The other, another case that we cite is *Archer*  
16 *versus Medical Protective Company* out of an Amarillo Court.  
17 And interestingly enough it talks about this sort of conduct  
18 by a lawyer falling into the category of then supporting a  
19 claim for breach of fiduciary duty. That is conflicts, self  
20 dealing, use of confidential information, and so forth. And  
21 so, that's basis for the claim.

22 THE COURT: Okay. And then on -- hold on, to the  
23 extent that Mr. Reasoner was arguing about the failure to  
24 plead fiduciary duty as to Mr. Hryck.

25 MR. SAMET: Excuse me, Your Honor.

1 THE COURT: Did you have anything further there?

2 MR. SAMET: Sure, Your Honor.

3 I didn't -- again, Avery Samet for the Plaintiff.

4 The complaint alleges that Mr. Hryck is the main  
5 partner for Reed Smith. Reed Smith is representing  
6 (indiscernible) from at least February 2016 through 2017 --

7 THE COURT: Whether or not there was an engagement  
8 letter in place?

9 MR. SAMET: Yeah, whether or not there was  
10 engagement letter.

11 THE COURT: Yeah.

12 MR. SAMET: And I even talked about the problems  
13 with that engagement letter a little bit last week, and that's  
14 represented.

15 I also have to disagree with Mr. Reasoner's  
16 characterizations of --

17 THE COURT: I guess -- let me ask it this way:  
18 You're alleging that he was doing work in that time period,  
19 and that you're saying that should be sufficient. And then if  
20 in discovery it turns out, well, actually he wasn't doing any  
21 work in that time period, then maybe the argument then that  
22 Mr. Reasoner has traction, as you've said. But that would be  
23 a summary judgment question, not a motion to dismiss the  
24 question.

25 MR. SAMET: That's correct, Your Honor. I mean --

1       that's correct.

2               THE COURT:   Okay.

3               MR. SAMET:   That's correct.   I will also just point  
4       out the allegations against Mr. Hryck go beyond him drafting  
5       two particular documents.

6               THE COURT:   Okay.

7               MR. SAMET:   Thank you.

8               THE COURT:   All right.   All right, thank you.

9               So then as to also improper benefit arguments,  
10       Mr. Nunes and Stone Pigman also had motions up for points in  
11       consideration there.

12              Mr. Fogler, do you want to go first?

13              MR. FOGLER:   Yes, Your Honor.   Murray Fogler for  
14       Tony Nunes.   I'll be very brief because I know Mr. Kryder has  
15       a lot more to say about this.

16              And let me start off by saying that Mr. Corn's  
17       explanation about how we got to this line of cases is correct,  
18       but doesn't really get to the point of why the anti-fracturing  
19       rule was put into place.

20              And the reason -- the impetus for this was,  
21       negligence has a two-year statute of limitations, breach of  
22       fiduciary duty has a four-year statute of limitations, like  
23       fraud.

24              And so, clever Plaintiffs lawyers who had a claim  
25       against a lawyer, but it was -- would had otherwise been time

1 barred because he was more than two years past, would try to  
2 recast their claim as something other than negligence, that  
3 would fall within, they hoped, a four-year statute of  
4 limitations.

5 Well, we have that problem here because they waited  
6 so long to bring the claims here. And so, they would  
7 naturally want to try to recast this as a four-year limitation  
8 period.

9 Now, more to the point about Mr. Nunes, my client,  
10 this really is a pleading issue, Judge, because the breach of  
11 fiduciary claim, the very first cause of action in the first  
12 amendment complaint against Mr. Nunes, refers only, and  
13 pointedly, only to his conduct as an officer. There is no  
14 allegation in this pleading about his conduct as a lawyer  
15 *per se*. That is, he had some ethical responsibilities here.  
16 He had a conflict of interest. I mean, they plead conflict in  
17 other context, but it is in the context of his alleged  
18 position as an officer of the company.

19 THE COURT: As the officer, it's as general counsel  
20 though, right?

21 MR. FOGLER: It is.

22 THE COURT: And is that a distinction that matters?  
23 I mean, that that's acting as a -- general counsel is a lawyer  
24 because typically it doesn't have to be, but typically is.

25 Is there a distinction there that it needs to be an



1 outside lawyer versus the --

2 MR. FOGLER: I don't think it does, but it's clear  
3 by the way they have lumped the allegations together, that  
4 they're not talking about his conduct as a lawyer giving legal  
5 advice. Because they say, for example, this is paragraph 175  
6 of the first amendment complaint: Defendants Hord, Nunes, Van  
7 Stephoudt, Degenhardt, Elder and Ganer, reached their  
8 fiduciary duties of loyalty, good faith, care and obedience.  
9 How? By operating Fury in a manner so as to solely benefit  
10 themselves and causing material harm to Fury.

11 THE COURT: So if I go with this argument, I would  
12 necessarily also be saying Ganer and Hord fall by the way.

13 MR. FOGLER: Well, this is going to get us back to  
14 the argument that we had yesterday --

15 THE COURT: Okay.

16 MR. FOGLER: -- about the provision of the limited  
17 liability company.

18 THE COURT: Oh, I've got that, but no, I understand  
19 that argument.

20 MR. FOGLER: They're trying to -- I think they're  
21 trying to steer away from -- they see where the Court's going,  
22 I think with Section 9 of the LLC agreement. And they have,  
23 oh, we need to -- even though our complaint clearly talks  
24 about Mr. Nunes as an officer, what we really meant was, he  
25 was acting as a lawyer and he had duties as a result of his

1 legal relationship with the company, but that's not what they  
2 pleaded.

3 THE COURT: Okay. All right. I hear what you're  
4 saying there.

5 As I understood it from the briefing, there was  
6 argument on this point. We were just talking about improper  
7 benefit and whether that had been sufficiently shown when that  
8 moved on to Mr. Hryck and Reed Smith.

9 Is Mr. Nunes also -- I hear what you're saying about  
10 the capacity argument, where that would fit. As to improper  
11 benefit, is there something that you say is factually  
12 deficient there?

13 MR. FOGLER: Well, there is here. And Mr. Kryder is  
14 going to have a whole lot more to say about the allegations  
15 about the payment for Mr. Nunes' services as general counsel.

16 But they made some separate allegations that there  
17 was a separate company set up, Advanced Drilling, and that  
18 Mr. Nunes was not only named manager of that company, but they  
19 don't say because they don't have any evidence, and there's  
20 nothing alleged in here, that any benefit came to Mr. Nunes  
21 personally. That is a deficiency in the complaint.

22 THE COURT: Okay.

23 MR. FOGLER: So they tried to get there, but they  
24 don't succeed.

25 THE COURT: Okay. All right. Thank you.

1 All right. Mr. Kryder for Stone Pigman.

2 MR. KRYDER: Thank you, Your Honor. George Kryder  
3 for Stone Pigman.

4 As to Stone Pigman, this is not a pleading issue.  
5 The Plaintiff's claim for breach of fiduciary duty fails as a  
6 matter of law for two reasons. One -- at least two reasons.

7 One, no improper benefit. And secondly, no  
8 vicarious liability to begin with --

9 THE COURT: And I have a note to myself on this. Is  
10 you main argument vicarious liability? I mean, obviously that  
11 would dispose of the improper benefit. But does the improper  
12 benefit argument sort of depend on the vicarious liability  
13 theory having been found in first place?

14 MR. RYDER: Well, for one thing, I mean, Plaintiff,  
15 if you go in the timeline and however it may fit into the  
16 Court's outline, the Plaintiff failed to plead that some Stone  
17 Pigman, or Cogan before them, were vicariously liable for  
18 Mr. Nunes.

19 And so, in the first place, they're not liable for  
20 him. They, in fact, had negated vicarious liability by saying  
21 he was seconded by saying that he acted solely for his own  
22 benefit; that he was purportedly self dealing; that he  
23 purportedly gained interest in middle man companies. Neither  
24 Cogan nor Stone Pigman was alleged to have received any  
25 interest in a company, which on some basis could be a

1       purported self dealing improper benefit.

2               So they flunk on vicarious liability.

3               THE COURT: I got it.

4               MR. RYDER: And if there's no vicarious liability  
5 that Cogan might have for Mr. Nunes --

6               THE COURT: Yes.

7               MR. RYDER: -- there's obviously no liability to  
8 which Stone Pigman later could become a successor under some  
9 other theory.

10              And this isn't a mere omission. They pled one or  
11 more other Defendants in the case were acting the course of  
12 their work. That is not the case with respect to Stone Pigman  
13 or Cogan. And, Your Honor, you've already given them leave to  
14 replread once with respect to successor or any other  
15 liability. And so, respectfully, this is not pleading issue  
16 for them.

17              As to the improper benefit, attorneys' fees don't  
18 support breach of fiduciary duty and claims as a matter of  
19 law. I agree with Mr. Rosen, that Judge Godbey's decision in  
20 the *Greenberg Traurig* case in the Northern District is well  
21 founded.

22              At page 13 of our motion we discuss *Juan Pack* and  
23 *Ashton v. KoonsFuller*, a Dallas Court of Appeals case. These  
24 recite the very basic tenant that regardless of the label that  
25 you put on it, if the lawyer has only received attorneys'

1 fees, or they say even the expectation that a lawyer is going  
2 to earn a fee, which is what we have all done in our careers,  
3 that is not enough to sustain a breach of fiduciary duty plan.

4 So to put it in the context here, even if Mr. Nunes  
5 received \$50,000 a month, while that he was associated with  
6 Cogan from 2011 to 2016, which by my math is like \$3-1/2  
7 million, that's not an improper benefit to Mr. Fogler's  
8 client. It's just attorneys' fees. And Cogan never got those  
9 fees. And of course, Stone Pigman never got those.

10 And while Mr. Corn listed a series of cases about  
11 fee disgorgement, he really missed the point. Because as a  
12 matter of law, you can't disgorge fees you never received.

13 So, Stone Pigman can't be required to pay damages or  
14 disgorge fees that went to Mr. Nunes, fees that never went to  
15 Cogan at all. And --

16 THE COURT: And so, for the breach of fiduciary duty  
17 claim, in terms of the timeline on when that's actionable, is  
18 that -- is the allegation that Stone Pigman has some liability  
19 there because of work that Nunes was doing or fees that were  
20 being paid at the time he was at Cogan Partners, not after the  
21 time he was at Stone Pigman.

22 MR. RYDER: So there's successor liability claim  
23 under whatever theory depends on fees that were between 2011  
24 and the end of December 2016 while Mr. Nunes was at Cogan.

25 THE COURT: And that's all at Cogan?

1 MR. RYDER: That's all at Cogan.

2 THE COURT: Okay.

3 MR. RYDER: They do allege, as Mr. Samet addressed  
4 yesterday, that from January of 2017, until Stone Pigman and  
5 Mr. Nunes, everybody was terminated, that allegedly Stone  
6 Pigman received \$843,000. Those are still attorneys' fees,  
7 but those aren't any -- that is on Stone Pigman's watch.

8 The other --

9 THE COURT: Got it.

10 MR. RYDER: -- \$600,000 a year times roughly six  
11 years was while Mr. Nunes was associated there at Cogan.

12 THE COURT: Got it. Okay.

13 MR. RYDER: So Mr. Corn mentioned the *Burrow* case.  
14 That's *Burrow v. Arce*, 997 S.W.2d 229. And, Your Honor, this  
15 is the Supreme Court's original decision talking about fee  
16 disgorgement. And there, there was an aggregate settlement,  
17 roughly \$190 million. And the lawyer took -- he entered into  
18 the settlement without client consent and took a share of that  
19 money.

20 Well, that's like theft, it's a clear improper  
21 benefit. And the Supreme Court opinion doesn't really focus  
22 on the merits of the breach of fiduciary duty claim, other  
23 than to say that fee forfeiture is a matter of law for the  
24 Court. It's not an issue for the jury. It's a matter of law  
25 for the Court under a five factor test. But nothing in that

1 case or the 23 years of jurisprudence since, could suggest  
2 that an attorney or law firm, in the position of Stone Pigman,  
3 could ever be required to discourage funds it never received.

4 So it's pretty simple for the 3-1/2 million or more  
5 dollars that purportedly went to Mr. Nunes as attorneys' fees  
6 and the like before he ever got to Stone Pigman, that's off  
7 the table under any theory, certainly under any breach of  
8 fiduciary duty theory.

9 Mr. Corn mentioned *United Pentecostal* case. It  
10 doesn't support their claim. There the lawyer stole the money  
11 that the church had given to the lawyer to put in the trust  
12 account for safekeeping. That's clearly an improper benefit.  
13 The lawyer received some of the stolen funds.

14 The *ERI versus Swania* case Mr. Corn mentioned,  
15 again, it does not support their case. In fact, it's a  
16 non-attorney case. It involved buyout funds that were ill-  
17 gotten gained, and the Court ordered these buyout funds to be  
18 disgorged upon a showing of fraudulent inducement.

19 There's no similar claim here. And the principle of  
20 disgorging fees -- I'm sorry, sums as in *Swania*, as in *United*  
21 *Pentecostal* or the *Kins Clock* (phonetic) case that does not  
22 apply in the attorney context. We cited *Gregory versus Porter*  
23 *and Hedges* for that proposition. You simply can't be ordered  
24 to disgorge those fees.

25 So for the reasons argued, Your Honor, and those in

1       our brief, we concur with our fellow Defendants that the  
2       attorneys' fees are not enough. And as to my clients, with  
3       the addition of the --

4               THE COURT: Vicarious liability.

5               MR. Ryder: -- vicarious liability argument, we  
6       believe they can't support the claim.

7               THE COURT: Okay, thank you.

8               MR. ROSEN: Your Honor, may I have just two  
9       minutes --

10              THE COURT: Sure.

11              MR. ROSEN: -- to respond to Mr. Corn?

12              THE COURT: To respond to Mr. Corn?

13              MR. ROSEN: Mr. Corn.

14              THE COURT: Okay.

15              MR. ROSEN: Okay. I'm going to respond to --

16              THE COURT: It's going to be --

17              MR. ROSEN: I'm happy to --

18              THE COURT: -- it's a free for all after that. So  
19       go on, it's just fine. No, no. We might as well. Because I  
20       think Mr. Corn is going to be getting back up to respond, so  
21       we might as well address whatever you want to tell me now.

22              MR. ROSEN: Sure. So I think, obviously I agree  
23       with what Mr. Kryder said, in terms of the cases. Two things,  
24       two fundamental things to keep in mind. One is a breach of  
25       fiduciary duty claim is not the same as a fee forfeiture



1 claim.

2 So, to the extent they site fee forfeiture cases,  
3 that's very different. And they themselves tell you that,  
4 because in their brief they address the breach of fiduciary  
5 duty claim and then they -- then they add, at page 15, an  
6 equitable forfeiture of fees paid to Fury's available as a  
7 remedy, separate and apart from whether those fees satisfy the  
8 improper benefit element.

9 So all of the discussion about forfeiture cases,  
10 that Mr. Corn talked about and Mr. Kryder identified, have  
11 nothing to do with the question of improper benefit. And it  
12 goes back to that fundamental distinction. They want to bring  
13 a claim for disgorgement for forfeiture of fees in however  
14 amounts were alleged, seven figures --

15 THE COURT: Like he understood --

16 MR. ROSEN: That's very different --

17 THE COURT: What's the statute limitations on that?

18 MR. ROSEN: I should know that, Your Honor --

19 THE COURT: Yeah.

20 MR. ROSEN: -- but I have to confess I don't have it  
21 off the top of my head at this time.

22 THE COURT: I just wonder if it plays into the same  
23 two-year limitation that we were talking about.

24 MR. ROSEN: I think it's remedy. So it may tie to  
25 the claims, like typically you would see that pursuant to

1 another cause of action.

2 THE COURT: Uh-huh.

3 MR. ROSEN: But there's a very big difference  
4 between seeking forfeiture of fees of a million dollars or so  
5 and seeking damages for breach of fiduciary duty of a hundred  
6 times that, and that's what they're doing here.

7 So, to suggest that forfeiture cases, which they  
8 acknowledge as a remedy, has anything to do with the question  
9 of improper benefit, I think is apples to oranges.

10 Moreover, the question of improper benefit is not as  
11 Mr. Corn said, a tool; it is a requirement. They must  
12 establish an improper benefit. And the case law is clear that  
13 the attorneys' fees that were paid, which may be subject to an  
14 equitable forfeiture claim, but those attorneys' fees subject  
15 to that claim do not satisfy the improper benefit.

16 I really don't think there's much of a dispute about  
17 that. They themselves call it separate. So the question is,  
18 what beyond that is an improper benefit?

19 And, you know, we cited the cases I referred to the  
20 *Stanford* case and the *Murphy* case, et cetera. I don't think  
21 it's a coincidence, and you didn't see them talk about  
22 *Stanford* or *Murphy* in their brief, and you didn't hear word  
23 one for Mr. Corn about those cases.

24 For the reasons, I think I articulated, and I'm not  
25 going to -- I won't repeat here. You know, the citation, the

1 cases about stealing client money. Mr. Kryder referred to the  
2 *Pentecostal* and *Burrow* case and the *RCI Consulting* case, none  
3 of that has anything to do with -- or the type of theory that  
4 they're alleging here.

5 There's no allegation that Reed Smith or anyone at  
6 Reed Smith took money from Fury, other than being paid for  
7 fees. And so, all that leaves you is the *Archer* case that he  
8 cited, which was discussed in every one of the cases I  
9 discussed with the Court earlier in my remarks. And that case  
10 was distinguished by those cases. "Those cases" being the  
11 cases that squarely held in some of the language that I quoted  
12 for the Court, that the very theory that the Plaintiffs are  
13 making, you were interested in helping somebody else, other  
14 than Fury. You had an interest in preserving your  
15 relationship or gaining other fees from someone else. All of  
16 that was squarely rejected.

17 So when you parse through the cases that they've  
18 cited and put their theory up against the cases that we've  
19 cited, all of which post-date *Archer*, you're left with the  
20 inexorable conclusion that what they alleged does not satisfy  
21 the improper benefit, and the motion to dismiss should be  
22 granted because there's no dispute that this is a question of  
23 law.

24 THE COURT: Okay.

25 MR. ROSEN: Thank you.

1 THE COURT: All right. Thank you.

2 For Plaintiffs, who? Mr. Corn, Mr. Samet?

3 MR. SAMET: Here's what we're going to do, Your  
4 Honor. I'm going to respond to some of the --

5 THE COURT: Okay.

6 MR. SAMET: -- arguments directed towards the  
7 complaint and about what we alleged as vicarious liability and  
8 what Mr. Corn --

9 THE COURT: Okay, good.

10 MR. SAMET: -- will speak back to the improper  
11 benefit issue (indiscernible).

12 And very briefly, Your Honor, let me start with  
13 Mr. Nunes. We've sued Mr. Nunes as general counsel, and we've  
14 also alleged that while he was partially succumbent, he also  
15 represented Fury both at Cogan Partners and at Stone Pigman,  
16 and that those firms undertook actions in connection with the  
17 allegations in the complaint.

18 Mr. Nunes, as I understand his papers, does not  
19 concede that he was partially succumbent general counsel. But  
20 our theory is that he was. In the complaint Mr. -- or counsel  
21 cited paragraph 175, which is of course true, that we say that  
22 all of the officer Defendants in that paragraph breached their  
23 fiduciary duties by operating Fury in the manner so as to  
24 solely benefit themselves.

25 But in paragraph 173, we say Mr. Nunes has breached

1 his duty of loyalty by charging the Randolph the officer rate,  
2 from entities he secretly owned, overcharging Fury and  
3 retaining the resulting benefits for themselves.

4 So, we believe that we have pled to the extent that  
5 as a lawyer where we pled that he has -- Stone has his own  
6 pecuniary interest in the transactions.

7 Number two. With respect to -- let me get into it  
8 this way. With respect to the vicarious liability arguments,  
9 it is our -- it is our position that in general, law firms  
10 have vicarious liable for its partners and the actions they  
11 take while they're representing clients.

12 We've cited cases like, Your Honor, that this is the  
13 partial succumbent, that the issue of the control of the  
14 control of the employer is a matter of fact, that's not  
15 subject to a pleading issue.

16 And we've also argued that the argument that the  
17 either Cogan Partners nor Stone Pigman had, they lacked any  
18 control over Mr. Nunes is implausible.

19 I also want to point out the complaint does contain  
20 allegations of the law firms being involved in the scheme,  
21 both to form some of the subsidiary companies that's at Cogan  
22 Partners, of course, and also at Stone Pigman while the  
23 activity is still going on.

24 I believe we alleged that Mr. Nunes --

25 THE COURT: So in terms of the succumbent issue --

1 MR. SAMET: Yes.

2 THE COURT: -- I thought yesterday, when we were  
3 discussing his work at Cogan Partners, that that was -- is  
4 there going to be a factual dispute about whether he was  
5 partially or fully on a succumbing assignment at that time?

6 MR. SAMET: I don't think -- it's going to be up  
7 to --

8 THE COURT: You think it was partial and that he was  
9 still doing work as a partner for Cogan and Stone Pigman?

10 MR. SAMET: His contract allowed him --

11 THE COURT: Okay.

12 MR. SAMET: -- that he was only working half time at  
13 Fury and he could have other clients.

14 THE COURT: Yeah. Actually, what I'm remembering is  
15 that as the \$50,000 per month at that time, was simply being  
16 paid directly to him.

17 MR. SAMET: That's correct.

18 THE COURT: And that's different than the issue that  
19 we're talking about right now, full and partial.

20 Okay, got it. All right, go ahead.

21 MR. SAMET: That's right.

22 The thing I was going to say about Cogan Partners is  
23 that I believe that -- and let me find it in our complaint.  
24 In the draft of engagement letter that Stone Pigman sent to  
25 Fury, it actually included a waiver of this issue, that if any

1 conflict arose -- that there was a conflict and they wanted  
2 Fury to sign off on it, that it wouldn't cause a conflict with  
3 Mr. Nunes' or the firm's representation of Fury.

4 Now -- and I'm here to say that was sufficient and  
5 I'm not sure that was signed. But the idea that Stone Pigman  
6 itself knew at the time contemporaneously that this was --  
7 that this was an issue.

8 And I will let, I think that response to --

9 THE COURT: Okay. Thank you.

10 MR. SAMET: -- to the pleading issues, I'll let  
11 Mr. Corn go back to legal issues on improper benefit.

12 MR. CORN: The sorts of things that have been  
13 alleged are the sorts of things that fall into the classic  
14 categories of disloyalty, the classic categories for breach of  
15 fiduciary duty. Of course, I've made comments about it in  
16 several of the cases that have been cited.

17 But that case, which the Defendant's cited, has  
18 commentary value.

19 THE COURT: Let me ask this in terms of cases.  
20 There's one thing that I did pick up on the last round of  
21 arguments.

22 I hear you about disloyalty, I hear you about  
23 conflicts of interest in doing the work.

24 On cases that you're citing to me, are they for  
25 propositions where it's beyond the disgorgement of fees? That

1       it's, in fact, okay, because you were disloyal, there's this  
2       whole other category of damage and injury that can be  
3       collected for that's beyond the fees that were paid to you.

4               MR. CORN: I'm not sure if I can direct the Court to  
5       a specific one. However, the concepts of what they say, I'll  
6       leave that to --

7               THE COURT: And that's the -- because I was also  
8       hearing that, too, is that sort of conceptually those overlay  
9       together, that I've been just in sort of trying to, in the  
10      legal world and the legal ethical world, what it means as a  
11      consequence to law firms and what it might be that they're  
12      exposing themselves to --

13              MR. CORN: Well --

14              THE COURT: -- and if other Courts have said, I  
15      don't just take, you know, other contexts of companies that  
16      have collapsed or dissolved or whatever, where the law firms,  
17      because of what they were doing, exposed themselves to what  
18      are much larger scope of loss than just simply fees, that may  
19      have been substantial, but simply the fees that have been paid  
20      along the way.

21              MR. CORN: I think the idea is that that is one  
22      remedy.

23              THE COURT: Yeah.

24              MR. CORN: It's not the only remedy.

25              THE COURT: Uh-huh.



1 MR. CORN: And I don't think it's articulated as the  
2 only remedy. It's a useful remedy that's out there and  
3 there's cases that talk about it, but they don't exclude the  
4 prospect of other damages.

5 THE COURT: Okay.

6 MR. CORN: For example, there could be other amounts  
7 that the disloyal attorney earns as a result of the disloyal  
8 conduct, and those could be a factor as well.

9 So I was going to mention the *Beck* case where the  
10 gist of the complaint is not disclosing and having a conflict  
11 and so forth. Again, disloyalty, breach of fiduciary duty,  
12 independent of the type of or quantity based type of claim.

13 The *Archer versus Medical Protective* case also  
14 articulates some of these concepts as well, self dealing, use  
15 of confidential information, conflicts, and so forth as the  
16 foundation for breach of fiduciary duty claims as independent  
17 from.

18 THE COURT: And those cases get to a conclusion of  
19 breach of fiduciary duty. And then the concept -- and maybe  
20 nothing more was pleaded or sought. But then the consequence  
21 of that is disgorgement of fees in that particular case.

22 But you're saying conceptually, it would overlay  
23 onto --

24 MR. CORN: They talked about the concept of it.

25 THE COURT: Yeah, okay.

1 MR. CORN: Okay. So I just wanted to point that  
2 out.

3 THE COURT: And I think Mr. Samet has something for  
4 you.

5 MR. SAMET: I apologize, Your Honor.

6 THE COURT: That's okay.

7 MR. SAMET: Just because Your Honor asked, and I was  
8 thinking that in the -- and I know the line in cases of  
9 *Burrow's* and *Pentecostal* and I think the other one was *ESI*,  
10 *ERI*?

11 THE COURT: *ERI*?

12 MR. SAMET: And I think this goes direct to -- when  
13 the Court is talking about disgorgement, the Supreme Court is  
14 referring saying, even if you cannot prove actual damages, you  
15 can still get disgorgement. I think the take from that is  
16 that the actual damages --

17 THE COURT: I can hear you saying of proving actual  
18 damages --

19 MR. SAMET: That's causation and everything else.

20 THE COURT: Therefore they don't. Okay.

21 MR. SAMET: And I would also point out, Your Honor,  
22 in the *Pentecostal* case, while it's true there was  
23 embezzlement, I think it's overstated, because the lawyer who  
24 embezzled the money went to jail. The law firm and the other  
25 lawyer in the case was working on it. They continued in that

1 appeal and they were liable.

2 THE COURT: Okay. Go ahead, Mr. Kryder.

3 MR. KRYDER: Just, I had to clarify something on  
4 *Burrow versus Arce*.

5 What the Court said there is, it's a matter of law  
6 if you find a clear and serious violation breach of fiduciary  
7 duty, so then there's this five factor test that the Court  
8 looks to about whether fee forfeiture is appropriate. So it  
9 does deal with breach of fiduciary duty, and the predicate has  
10 to be a clear and serious violation before the Court would use  
11 that remedy.

12 Turning to the issue of vicarious liability, there  
13 is no allegation as to my client about vicarious liability or  
14 course and scope. If the Court thinks of cases in our careers  
15 and one of them come before the Court where someone is suing  
16 an employer, how many times are you going to find where they  
17 say nothing about vicarious liability, nothing about scope?  
18 And the answer is you won't see it except in this complaint.

19 They did make one allegation that Mr. Van Stephoudt  
20 acted in the course and scope of his employment at Reed Smith,  
21 that's paragraph 176. You won't find anything else in the  
22 entire complaint about Mr. Nunes being within the course and  
23 scope of his employment at Stone Pigman or Cogan. In fact,  
24 the allegations of succumbent purported self dealing for his  
25 own benefit, negate any sort of course and scope.

1                   Finally, Your Honor, we pointed to the Supreme  
2                   Court's *St. Joseph hospital versus Wolff* case. And there, the  
3                   Court pointed out that the Plaintiff had five vicarious  
4                   liability theories that the Court looked at. They don't even  
5                   have one here. You can't find it.

6                   So, respectfully, this is not a pleading issue.  
7                   They should -- you've already given them leave to replead  
8                   once their theories as to Stone Pigman and urge that our  
9                   motion be granted in whole or in part.

10                  THE COURT: All right, thank you. All right.

11                  MR. ROSEN: If I may have 30 seconds?

12                  THE COURT: 30 seconds. I promised a free-for-all,  
13                  so.

14                  MR. ROSEN: You notice I'm falling down in time. I  
15                  went from several minutes to two minutes, and now I'm on  
16                  30 seconds.

17                  UNIDENTIFIED SPEAKER: Six seconds.

18                  MR. ROSEN: No, that doesn't count.

19                  THE COURT: You've got 20 seconds left.

20                  MR. ROSEN: In substance 30 seconds. All right.

21                  In *Beck*, which addressed *Archer*, *Beck* concluded in  
22                  the context of the case where the lawyers were participants in  
23                  a -- served on the Board of Directors in the scheme and  
24                  profited from that.

25                  The *Beck* Court nevertheless said, we conclude

1 without difficulty here the appellant's conflict of interest  
2 complaint sounds in negligence only, and not breach of  
3 fiduciary duty.

4 So whatever it is counsel said about that case, I  
5 would submit supports our position, because the conclusion  
6 was that everything about *Beck* that counsel was talking about  
7 was determined by the Court, not to support.

8 And I don't want there to be the impression, and I'm  
9 confident the Court doesn't have it, but to state the obvious,  
10 it's not like lawyers who engage in conflicted transactions,  
11 but improper benefit doctrine is not satisfied or immune.  
12 They are subject to a negligence cause of action for breach of  
13 duty.

14 So the suggestion that this is somehow insulating  
15 lawyers, I think is important to make clear that that isn't  
16 the case --

17 THE COURT: No, that's the, I think that that's the  
18 point of the anti-fracturing rule and that it's one or the  
19 other, and statute of limitations issues can sometimes dictate  
20 what you're going to try to plead.

21 Also, well, maybe both causes of action would open  
22 up the same scope of damages. But that's obviously the other  
23 consideration that you have --

24 MR. ROSEN: Correct.

25 THE COURT: -- of what you're trying to recompense.

1 MR. ROSEN: And the *Pentecostal* case, I think,  
2 illustrates that in the sense that the damages was the money  
3 that was stolen.

4 THE COURT: Uh-huh.

5 MR. ROSEN: And I think the underlying case was the  
6 church suffered hurricane damage, and they got some insurance  
7 money and the lawyers stole it. The lawsuit was to the theft  
8 of the funds.

9 THE COURT: No. And the damage here rippled out  
10 more than that.

11 MR. ROSEN: Than this case.

12 THE COURT: Than this case is what I'm talking  
13 about.

14 MR. ROSEN: That's the allegation, but --

15 THE COURT: Right.

16 MR. ROSEN: And that's the point. If they wanted to  
17 allege to rippled out the damages, they were free to do in the  
18 negligence card.

19 THE COURT: And negligence would give them that?

20 MR. ROSEN: Exactly.

21 THE COURT: Okay. All right. Thank you.

22 MR. ROSEN: Thank you.

23 THE COURT: All right. Let's move on to civil  
24 conspiracy claims. And I have that it's only Mr. Van  
25 Stephoudt and Mr. Hryck, who have more arguments on the civil

1 conspiracy *per se*.

2 MR. REASONER: Your Honor. I think we --

3 THE COURT: And then, honestly, at this point, you  
4 know, we may be repeating ourselves under the arguments. But  
5 it's a separately broad aspect of -- I have that failure to  
6 plead some specific facts as to that, and intra-corporate  
7 conspiracy doctrine.

8 MR. REASONER: Yes.

9 THE COURT: If you have anything further, you'd like  
10 to address, I'll give you time to do so.

11 MR. REASONER: The only thing I would highlight  
12 there, Your Honor, is what you find are merely: Here is an  
13 email and here is a conclusory statement about some meeting of  
14 the minds. They do not come in with a requisite specificity  
15 to show a meeting of the mind or an improper end as to either  
16 Mr. Hryck or Mr. Van Stephoudt. So that's the pleading  
17 deficiency.

18 And then as we discussed it at length yesterday, the  
19 disclaimer in the agreement would eliminate the conspiracy  
20 claim --

21 THE COURT: And then --

22 MR. REASONER: -- because the --

23 THE COURT: -- itself.

24 MR. REASONER: -- co-conspirators would not have a  
25 breach, would not have a duty that they breached.

1 THE COURT: Okay. All right. Thank you.

2 Mr. Samet, anything that you need to respond to on  
3 that?

4 MR. SAMET: I disagree with those, sir. I don't  
5 know that -- other than repeating my argument --

6 THE COURT: I was going to say for reasons  
7 previously stated, you would rest on your briefing and your  
8 argument yesterday?

9 MR. SAMET: Yes, Your Honor.

10 THE COURT: Okay. All right. Thanks.

11 The only other -- so as to the law firms and  
12 lawyers, the only other two things that I see that could be  
13 addressed are Reed Smith brought up arguments as to exemplary  
14 damages and attorney fees. If you'd like to say something on  
15 that?

16 And, Mr. Fogler, there was impermissible group  
17 pleading I think at the lead of your motion.

18 Neither are particularly long arguments in the  
19 briefing, but anything further that you would want to say on  
20 either of those?

21 MR. ROSEN: Your Honor, Kevin Rosen.

22 The only thing I would say on it is, neither is a  
23 cause of action.

24 THE COURT: Uh-huh.

25 MR. ROSEN: I understand that it can be pled in



1 remedies. So, two things. One is, they shouldn't be  
2 causative action. And number two, on the attorneys' fees  
3 point, we called out that they're not entitled to attorneys'  
4 fees. The Plaintiff said, well, we're entitled to attorneys'  
5 fees for certain of our fraudulent transfer claims under Texas  
6 Business and Commerce Code Section 24.013.

7 So in light of that, I would respectfully request  
8 that the Order simply make that clear that the Plaintiff was  
9 only entitled to their fee claim as a remedy, only the  
10 attorneys' fee claim only applies to a claim that fits under  
11 that statute.

12 I think that clarification and limitation will  
13 benefit the parties over the course of the case.

14 THE COURT: So the remedy is limited to what?

15 MR. ROSEN: If you look at their opposition brief,  
16 we said, you're not entitled to fees, you know, it's based on  
17 the standard rule that every state acknowledges. And  
18 opposition said, no, no, no. Texas Business and Commerce Code  
19 Section 24.013 allows for fees. That's section talks about  
20 state, certain types of state fraudulent transference.

21 I believe it's limited to constructive. So I  
22 believe the actual fraudulent transfer. But regardless, all  
23 they're saying is the opposition, I'm adding a little bit,  
24 but, we recognize we're not entitled to fees other than what's  
25 allowed under that statute.

1 THE COURT: Okay.

2 MR. ROSEN: And I think if the Order says that  
3 specifically --

4 THE COURT: And so, from following the statute,  
5 you're saying that would then link it as a potential remedy to  
6 the extent that actual fraudulent transfer is established, but  
7 not in any other respect?

8 MR. ROSEN: Correct.

9 THE COURT: Okay. Mr. Samet.

10 MR. SAMET: Yeah, just briefly. I think we listed  
11 them as independent cause of action, which originally filed in  
12 State Court.

13 THE COURT: Right.

14 MR. SAMET: That's correct. I believe that  
15 counsel's right. The actual fraudulent transfer claim is the  
16 only, I think --

17 THE COURT: Okay.

18 MR. SAMET: -- the only explicit claim provides for  
19 attorneys' fees.

20 You know, that last conversation, I just -- if such  
21 an Order is entered, I want to make sure that it doesn't touch  
22 on the potential for damages in the attorneys' fee context,  
23 but other than that --

24 THE COURT: What do you mean by that?

25 MR. SAMET: Well, as I want to go back to the

1 argument Mr. Corn was explaining. That even if in the  
2 disgorgement context, if the purpose of any tort damages is to  
3 put the Plaintiff in the same position had the tort not  
4 occurred, that could be a relevant consideration.

5 THE COURT: Okay. So if under -- so I guess what  
6 you're saying there is, if under breach of fiduciary duty  
7 claims, the law shows that disgorgement of fees is properly  
8 characterized as damages for that, you wouldn't say, well, we  
9 could still get it for breach of fiduciary duty?

10 MR. SAMET: In that narrow context. And --

11 THE COURT: As opposed to it just being a follow on  
12 remedy from a claim that's been established?

13 MR. SAMET: That's right.

14 THE COURT: Okay.

15 MR. SAMET: That's right, Your Honor.

16 THE COURT: Okay. I think I understand that.  
17 Do you?

18 MR. ROSEN: Yes, I do. I think another way to frame  
19 it, if I think about it. There's a difference between what  
20 they've alleged fees to prosecute this lawsuit and fees as  
21 damages. I mean, if they're alleging -- or fees that may be  
22 subject to some other form or some other remedy --

23 THE COURT: Uh-huh.

24 MR. ROSEN: -- disgorgement or forfeiture,  
25 what-have-you, but -- or I would acknowledge if someone's

1 budgeting fees as damages, I, as a result of somebody's  
2 typically seeing as negligence, as result of somebody's  
3 negligence I had to employ a lawyer to fix your problem. But  
4 that is very different than the lawyer I'm hiring to sue you.

5 THE COURT: Uh-huh.

6 MR. ROSEN: And the way this is pled is they want  
7 fees for counsel's action in suing all of the Defendants.  
8 That's what is not allowed, with the narrow exception of that  
9 statutory provision.

10 THE COURT: Oh, okay.

11 MR. ROSEN: That's the point.

12 THE COURT: Okay.

13 MR. ROSEN: Hopefully that's clear.

14 THE COURT: I got it. Okay.

15 Mr. Fogler, anything that you want to address on  
16 group pleading?

17 MR. FOGLER: In the interest of time, Your Honor,  
18 let's just stand on the brief.

19 THE COURT: All right. Thank you very much.

20 All right. Anything else on behalf of the law firms  
21 and lawyer Defendants that you'd like to raise? I think we've  
22 covered it.

23 All right. I see agreement on that. So why don't  
24 we take a 10-minute break and we'll let the tables reshuffle  
25 and we'll be back on the Record in ten. Okay?

1 Thank you.

2 (Recess taken from 2:37 p.m. to 2:51 p.m.)

3 AFTER RECESS

4 THE COURT: Okay, thank you. Everyone can be  
5 seated.

6 All right. Let's now take further appearances for  
7 the aspects that we have left.

8 Plaintiffs stay the same.

9 Who do we have for Defendants now?

10 MR. HILL: Judge, Marcus Hill, and I have my  
11 colleague, Mr. Jonathan Stoger here, along with my associate  
12 attorney, Ms. Kalen Burwell (phonetic) on behalf of Tom Hord,  
13 H-O-R-D.

14 THE COURT: Thank you.

15 MS. DANG: Good evening, Your Honor. This is  
16 Crystal Dang on behalf of Sierra Pine Resources International.  
17 And with me I have Graze Meshina (phonetic) who is my law  
18 clerk this summer.

19 THE COURT: Excellent, welcome.

20 MR. MESHINA: Thank you.

21 MR. HADDOCK: Good afternoon, Your Honor. William  
22 Haddock, on behalf of Kay Rieck and Helena Energy, LLC. With  
23 me also is Mr. Leonard Simon.

24 MR. SIMON: Good afternoon, Your Honor.

25 THE COURT: Good afternoon.

1 All right. Does For Mr. Rieck, do we have any  
2 motions, anything pending for him that we're arguing today? I  
3 know that we do for Helena, but --

4 MR. HADDOCK: Right.

5 THE COURT: -- you're here representing him. I'm  
6 sort of like, I don't have a motion from him, though, on what  
7 we're addressing right now. Do I?

8 MR. HADDOCK: He has no motion to dismiss under  
9 12(b) 6.

10 THE COURT: Okay.

11 MR. HADDOCK: We have that issue with the summons  
12 under 12(b) (5) .

13 THE COURT: Yep. And you-all will -- I'm going to  
14 take a look at that, but we'll figure out that issue, but  
15 separately from today.

16 MR. HADDOCK: Okay. All right. Thank you.

17 THE COURT: Okay. So there are some aspects of what  
18 we addressed yesterday, where Mr. Hord, Mr. Ganer, Sierra  
19 Pines, were also making argument. And so, I wanted to go over  
20 those first.

21 As to the fraudulent transfer claims, there was the  
22 time bar issue that had been raised. And I'll take that up  
23 first.

24 Is there anything further that Mr. Hord would like  
25 to be heard on as to that issue?

1 MR. STOGER: Yes, Judge. I put together a  
2 PowerPoint presentation --

3 THE COURT: That's what I thought that it related  
4 to.

5 MR. STOGER: I'm happy to present if the Court would  
6 entertain that?

7 THE COURT: I will. Is this PowerPoint directed  
8 only to that issue?

9 MR. STOGER: There were two issues, Judge. One was  
10 the statute of limitations issue under Section 546.

11 THE COURT: Uh-huh.

12 MR. STOGER: And if we could briefly touch on the  
13 fiduciary duty issue as well, there are a few comments I'd  
14 like to make --

15 THE COURT: Okay, great.

16 MR. STOGER: -- in addition to what we said.

17 THE COURT: All right. Let's take those up.

18 And on the breach of fiduciary duty, is that as to  
19 the fourth amended LLC?

20 MR. STOGER: Yes. And also, Your Honor, as to the  
21 third amended, as well.

22 THE COURT: Well, the third. Okay. The language is  
23 the same.

24 Okay. We'll take up both of those, and those are  
25 standalone for what I have.

1           So Mr. Samet, you'll be responding. We'll take both  
2 of these up and then you can respond.

3           All right, go ahead.

4           MR. HILL: Judge, If we may? on the limitations,  
5 Mr. Stoger's going to carry the water on that.

6           THE COURT: Okay.

7           MR. HILL: On the second one, that we just  
8 mentioned, he's got the lion's share, but I'd just like to  
9 reserve three minutes --

10          THE COURT: Okay.

11          MR. HILL: -- for some observations on some  
12 research.

13          THE COURT: All right. Thank you.

14          MR. STOGER: May it please the Court?

15          Your Honor, I will just to start off with  
16 Section 546. And I went back last night to take a look at the  
17 history of it. And this statute dates back to 1978. This is  
18 not new. I think most bankruptcy attorneys concentrate on  
19 subsection (1) that A case would be filed only two years after  
20 the order for relief when the case is first filed.

21          But there's also subsection (2). And one of the  
22 other points I would trace, and I think it plays into the  
23 later interpretation of the Bankruptcy Court's Decree, is that  
24 the bankruptcy power, just to highlight, is enumerated in our  
25 -- in the Constitution. It falls under Article One,



1 Section Eight, and I've seen some case law saying that  
2 Congress has plenary power in -- over bankruptcy law.

3 And, I mean, this is not an implied power. And I  
4 think it has to do with Congress's role and with the Court's  
5 role, and I'll touch on that is I get a little bit deeper.

6 But moving on, I just wanted to highlight, again,  
7 one of the cases we cited in the briefing, which was the *Nine*  
8 *West Securities* litigation case. And so --

9 THE COURT: Get we back up?

10 Just prepping for your argument. So based on citing  
11 me to (a) (2), is it -- are you moving towards an argument that  
12 it is, if the case is closed or dismissed, there's not really  
13 a savings power that the Bankruptcy Court has.

14 MR. STOGER: Yes, yes, exactly.

15 THE COURT: Statutorily that's where it says.

16 MR. STOGER: Exactly, Judge.

17 THE COURT: All right.

18 MR. STOGER: That's the exact argument. That the  
19 text for the statute controls that it's Congress' role to  
20 proscribe the law, and bankruptcy it's Court's role to follow  
21 the law. That's exactly it.

22 THE COURT: Okay.

23 MR. STOGER: No question.

24 Moving on that Section 546 applies to litigation  
25 trusts. It was applied in the *Nine West Securities* case. It

1 was just issued in 2020.

2 As far as the timeline, I would just highlight that  
3 the bankruptcy case was filed in August of 2019. The  
4 Confirmation Plan Order was in June 12th. The Motion for  
5 Final Decree was filed June 15th. The Final Decree was  
6 July 1st.

7 There was plenty of time for Fury to file this case  
8 before the bankruptcy was closed. This was not a matter of  
9 the hidden claim. Tom Hord and the other Defendants were  
10 actually mentioned in the Chapter 11 Plan.

11 This isn't a case where the litigation tries, to  
12 where Fury had to go out and search for claims. I mean, they  
13 knew these existed and could have filed them, you know, before  
14 entering the Final Decree.

15 And then moving on that, the controlling rule under  
16 the Bankruptcy Rules, is Section -- Rule 3022. And the key  
17 language here, the key factor is that a case shall be closed  
18 when it's fully administered, and that's the key focus. It's  
19 the "full administration" language.

20 And I see that over and over again in the bankruptcy  
21 pleadings. And the motion for Final Decree, Fury cited this  
22 several times. They used the language that this case has been  
23 fully administered. I mean, they cited it in paragraph 2 of  
24 their motion.

25 I'm sorry, Judge. I'm on Slide 6.

1           They cited it in paragraph 5. Again, they said the  
2       statutory basis for relief requested herein are Bankruptcy  
3       Code 350, which is the actual Bankruptcy Code statute that  
4       talks about closure. They cite Rule 3022.

5           I move on, Judge, to slide 7.

6           Again, in paragraph 24, they highlight again that  
7       the case has been fully administered. Then in the preceding  
8       portions of the motion they go through in great detail and  
9       list all the factors that the Courts consider as their factors  
10      in the advisory rules to Rule 3022. And they go through in  
11      great detail and they follow each one of the factors. And  
12      again, they state that the factors weigh strongly in favor of  
13      closing the case, because it's been fully administered and  
14      the Plan would've been substantially consummated.

15          And then this just plays back into where I was  
16      before the power. The Bankruptcy Courts derive their power  
17      principally from Section 105. It does give the Bankruptcy  
18      Court broad equitable power, but there are limits on that.  
19      And I cited this provision out of the Collier on Bankruptcy  
20      Treatise.

21          Again, what they say citing the Supreme Court  
22      precedent is that the Courts obviously do have broad equitable  
23      power, but that equitable power cannot be used to contravene  
24      another section of the Bankruptcy Code or any other State or  
25      Federal statute. And that plays back into Section 546. So

1       although Congress has given Bankruptcy Courts power, a general  
2       power. But they've specified, you know, as interpreted under  
3       the case law that that power can't be used to contravene  
4       another specific section of the Bankruptcy Code.

5               And coming back to that again, we have a Final  
6       Decree from the Bankruptcy Court in Delaware. And in the  
7       Plan, nowhere does that Decree mention Section 546. I didn't  
8       see that statute listed in the Decree. I don't see any  
9       explicit language in the Decree to overrule Section 546 or any  
10      other Bankruptcy Code statute.

11             And again, I think it would really raise a real  
12      separation of powers issue for a Court to even overrule a  
13      statute of limitations provision here or anywhere else. I  
14      mean, there's no argument that Section 546 is  
15      unconstitutional. It is a provision that was adopted under  
16      Congress' enumerated power. I think it's Article One, Section  
17      Eight.

18             So I think that, I think that for a Court to  
19      overrule that statute, or override it, is something that would  
20      exceed the Court's role. And just coming back to it,  
21      judgments as I've cited, just one, I think of many cases out  
22      there, that judgments are to be construed like other written  
23      instruments, like in my mind, other contracts.

24             And I mean, I'm not saying that the Decree here is  
25      ambiguous. I don't think it is, it doesn't mention 546. And

1 I don't think it was the Bankruptcy Judge's role to focus on  
2 the statute of limitations. But in the event that it was  
3 ambiguous, the general rule is that contracts, even if  
4 ambiguous, should be construed in a manner that makes them  
5 legal and enforceable, where that would be a logical  
6 conclusion.

7 And so in my view, the Bankruptcy Court wouldn't  
8 have had the authority to overrule or override Section 546,  
9 and the Decree should be construed and party, you know, with  
10 the principle that the Decree should be interpreted in the  
11 manner consistent with the law and to make it consummate with  
12 the Bankruptcy Code. But that was the point that I was trying  
13 to make.

14 And then coming to the *Vanguard* case. I read it and  
15 I think there's sharp distinction between that case and our  
16 case. As the Court there pointed out in *Vanguard*, that the  
17 Reorganized Debtors knew that the case was not fully  
18 administered and within the meaning of Section 350, the  
19 closure section.

20 And in the Motion for Final Decree by Fury. Fury  
21 pointed out -- Fury cited to Section 350(a), they cited  
22 Section 3022. So there's no question, I think in my mind,  
23 that Fury was not invoking Section 350 or the closure rule  
24 3022. So that's one distinction.

25 And again, in the Final Decree, the Bankruptcy Court

1 cited the motion. And I think what they were saying is I'm  
2 act -- the Court was saying, "I'm acting pursuant to  
3 Section 350, I'm acting pursuant to Section 3022."

4 And so -- and again, in the *Vanguard* case, the Court  
5 said that the Court intended to continue the administration of  
6 the estates of the Debtors. In contrast with the Fury Final  
7 Decree, the Court explicitly said that the Chapter 11 case of  
8 Fury is hereby closed.

9 I mean, so there's no question, I think, that the  
10 Court had in mind to close the case. And that once closed,  
11 just a simple syllogism that once that the case is closed,  
12 then the Bankruptcy Code claims of 544 and the 548 claims are  
13 time barred. This case was closed. And, therefore, the  
14 claims in this case are time barred.

15 And I know the Court yesterday had focused on  
16 Section 5 of the Decree and had discussed that. And again, I  
17 would say nothing in Section 5 mentions Section 546. Nothing  
18 about it purports to overrule or override Section 546, and  
19 nothing about Section 5, moving away, prevented Fury from  
20 bringing other causes of action in this case.

21 I mean, here, Fury has brought causes of action  
22 against many, many Defendants. I think it seems like almost  
23 everybody. I think perhaps not everyone for fiduciary duty.  
24 They've brought claims against other Defendants, I think it  
25 was one other Defendant for unjust enrichment. So nothing

1 about the Decree prejudiced Fury's right to bring claims, they  
2 brought other claims.

3 And so, I would just say in closing on this subject,  
4 that nothing about the Decree purports to overrule or override  
5 Rule 546. I don't, with all due respect to the Bankruptcy  
6 Court, I don't think the Bankruptcy Court had that power.  
7 I've never seen a Court override of statute of limitations  
8 before, you know, without due respect to the Court.

9 And I think that the Decree should be interpreted in  
10 a manner --

11 THE COURT: So what about the final clause here,  
12 "Without prejudice to the rights of closing Debtors to seek to  
13 reopen such cases for good cause shown?"

14 MR. STOGER: There's been no motion.

15 THE COURT: There's no motion, but you're saying you  
16 can't do it given the statute and the way it was done.

17 MR. STOGER: Right.

18 THE COURT: You have to go reopen and seek  
19 permission to do it.

20 MR. STOGER: Well, and also, I would say I don't --  
21 to be honest, I don't agree with the *Vanguard's* decisions  
22 outcome, but I would say that it does list several cases where  
23 Courts have held that even if the case is reopened at this  
24 point, it would not reactuate the statute of limitations. But  
25 we're not there.

1 THE COURT: Okay. Thank you.

2 MR. STOGER: Just a few other points, Judge. We  
3 talked about in the --

4 THE COURT: And I've looked at this already.

5 MR. STOGER: Okay.

6 THE COURT: I know has a duty to, under 1 means  
7 less.

8 MR. STOGER: Right, yes.

9 THE COURT: But 2, 3, and 4, or should, may or will.  
10 But it concludes, only since 1 is what you would use if you  
11 were strictly --

12 MR. STOGER: Yes.

13 THE COURT: -- drafting it.

14 MR. STOGER: Yes.

15 THE COURT: So --

16 MR. STOGER: I think that that covers it, Judge.

17 THE COURT: One of Mr. Garner's less helpful  
18 definitions.

19 (Laughter.)

20 THE COURT: He gathers in all usages of it, and  
21 that's always the point with what does "shall" means, that  
22 people use it in different ways.

23 MR. STOGER: And Judge, I looked at some other  
24 dictionaries as well. I didn't cite them all here.

25 THE COURT: Yeah.



1 MR. STOGER: But obviously it's an auxiliary verb,  
2 and most of them I've seen quote all these different messages.

3 THE COURT: Okay. All right. So let's -- thank you  
4 on that.

5 And is that an argument that pertains to the  
6 fraudulent transfer claims only or does it pertain to all  
7 claims that have been brought --

8 MR. STOGER: Well, Judge --

9 THE COURT: -- for breach of fiduciary duty. Would  
10 it pertain to that?

11 MR. STOGER: Well --

12 THE COURT: I have this -- I ask, only because in my  
13 chart on putting all things together here, I had it as part of  
14 the fraudulent transfer claim argument. And so I'm just  
15 wondering, does it sweep more broadly than that?

16 MR. STOGER: Well, 546 applies by its terms to the  
17 Bankruptcy Code claims to the 544, which is the strong arm  
18 statute, and then 548, which is the Bankruptcy Code fraudulent  
19 transfer. The TUFTA State law claims come in through 544 to  
20 the -- sorry, through the strong arm statute. So it would  
21 apply to the -- it would apply to Bankruptcy Code 548,  
22 fraudulent transfer claim, and then also to the State claims  
23 that are only viable through 544.

24 THE COURT: All right. All right. Thank you.

25 All right. And now, as to breach of fiduciary duty,

1       you had some more on the operating agreements.

2               MR. STOGER: Yes, Judge. I would just say, I know  
3 I've cited in the briefing, the *L3 Communications* case and the  
4 *B&B Parigus* (phonetic) case. The key factor that they pointed  
5 to, and those were two breach a contract cases and they  
6 weren't LLC cases. But one point I agree with the Plaintiffs  
7 on is these LLC agreements are treated as contracts and  
8 construed as contracts. And so, the operative language would  
9 be the amend and restate portion.

10              And again, in *L3* we had a letter of intent, and an  
11 original and amended letter of intent. The amended went  
12 through and talked about, we desire to amend and restate the  
13 original agreement. The Plaintiff brings -- tries to bring  
14 some claims under the original letter of intent.

15              The Court dismissed those claims. I'm citing this  
16 language because the parties' intent to supersede was  
17 basically evident from the amended and restated language. The  
18 same thing *B&B Paradis* citing *L3* reached the same conclusion.  
19 And there were breach of contract claims there. There was a  
20 breach of fiduciary duty claim in that case.

21              In reading the opinion, it wasn't clear exactly, you  
22 know, whether they're focusing on the fiduciary duty in this  
23 section of the opinion. I think they were, though. It was a  
24 long opinion, a little bit unclear.

25              And just to wrap it up, I was thinking about this.

1 This actually reminds me of a case that I had handled about  
2 five years ago. I hope you don't mind I focus on this. But  
3 it was *Supply Pro versus Ecosorb*. And basically what happened  
4 there, there was a suit of a -- there was a supply contract.  
5 There was a workout agreement after there was a problem with  
6 the supply contract. And then our client, who was the seller  
7 of the goods, filed suit over the workout agreement when it  
8 wasn't honored. The buyer, Defendant buyer alleged fraudulent  
9 inducement as to the original contract.

10 And what we argued, and which the Court of Appeals  
11 agreed with us on, there was that the Court held that the  
12 workout agreement was an novation of the earlier agreement,  
13 basically superseding the earlier agreement and dispensing  
14 with any fraudulent inducement. It was a defense there.

15 And so I was thinking about this, and I think that  
16 the analogy would be, I believe this more closely fits towards  
17 an novation. And when you have an novation, you have a  
18 subsequent agreement. Here I think it would be the third or  
19 fourth amended LLC agreements that supersede and take the  
20 place of the early agreements. And in that event, only the  
21 later agreements apply, any claims would have to be brought  
22 under the waiver agreement, which here includes the fiduciary  
23 duty exculpatory clause.

24 You know, in that case one of the arguments the  
25 other side tried to make, that there was no release language.

1 The Court, you know, rejected that and said that an novation  
2 discharged the obligation. I would just also point out that  
3 the Court in the *B&B Parabis* case agreed with the same theory,  
4 that the Defendant attempted to argue, there was no release  
5 language and the Court rejected that.

6 So with that, if the Court has any questions, I'll  
7 be happy to address those.

8 MR. HILL: Judge, I have --

9 THE COURT: Thank you. Yeah, go ahead.

10 MR. HILL: Yes, sir.

11 Judge, I want to talk about a doctrine at law that  
12 goes directly on the point of what we were just discussing  
13 that we just went off the screen. And that's called the  
14 relation back doctrine or the doctrine relation back.

15 There was much discussion yesterday between the  
16 counsel. Well, if the third and fourth are here, can they  
17 relate back here, can they then go forward? And there was  
18 even discussion on the word "shall" going forward being  
19 prospective.

20 Texas law recognizes three different ways the  
21 doctrine relation back or the relation back doctrine. First,  
22 as you know, we adopted the common law in 1836, and then again  
23 our current Constitution of 1876. And the common law treats  
24 it as a novation, that we were just talking about. And from  
25 my authority on the novation, I'd use the following quote:

1 "As a rule as said to an acceptance, acceptance of the terms  
2 of novation need not be shown by expressed words to that  
3 effect, but the same may be implied from the facts and  
4 circumstances attending the transaction and conduct of the  
5 parties."

6 So you say, did I sign off on those amended and  
7 restated, Mr. Hord? No, I did not. But our actions. We have  
8 the third, which were the taxes, clean slate, and the fourth,  
9 which are the Delaware, clean slate. We relayed back. That's  
10 the first leg of the three-legged stool.

11 We also recognize it in the statutes. Now it's  
12 being used for a particular purpose in the Civil Practice and  
13 Remedies Code when we relayed back. But how much more  
14 important is that than our pleadings, as we relate back.  
15 Again, the doctrine relation back.

16 And the third way is -- and this is what the  
17 revolution's about in addition to taxation without  
18 representation. And that would be deeds entitled to land, the  
19 free ownership, the fee off land.

20 And it's very important when you have, and I've got  
21 one at the Fifth Circuit right now on a correction deed. It  
22 all relates back. Here the amended and restated relate back  
23 to that original time and then go forward. Texas law  
24 recognizes it, and of course the federal rules will give you  
25 relate back on pleadings.

1 But I think it's important to point those out to the  
2 Court. For my authority, Judge, and for the Record, I rely on  
3 the *Flanagan versus Martin*, 880 S.W.2d 863. It's a Waco '94  
4 on the novation.

5 And in relation back, I've got a humdinger. Dinger  
6 of course being a home run home, humdinger when you got  
7 somebody on base.

8 I've got the Supreme Court of Texas in June the 6th  
9 of 1898, matters that arose beginning in 1860, and it's the  
10 doctrine of relation back, talking about how important it is  
11 to your property rights that you have. And this one,  
12 actually, they talk about how the Federal Courthouse in Tyler  
13 burned. So they bring in Federal law, State law. And that  
14 site is so old, it's 47 Southwestern Reporter, June 6th, 1898  
15 at page 712.

16 Judge, that's what I have to bring up about that  
17 relation back.

18 THE COURT: Thank you, sir.

19 MR. HILL: Thank you, Judge.

20 THE COURT: All right. Mr. Samet.

21 MR. SAMET: Thank you, Your Honor.

22 THE COURT: I've got a copy of the PowerPoint, if  
23 you want to refer to any page, yeah.

24 MR. SAMET: I have a copy. He handed me one.

25 THE COURT: No, I understand that if you want to

1 refer me to whatever page you're looking at.

2 MR. SAMET: Yeah, I might do that. And I have to  
3 say, I got a lot of motions -- I know Your Honor has just as  
4 many as I have to deal with, I recognize that.

5 But it seemed to me that there was a lot, both in  
6 the presentation and the last presentation, that was not in  
7 briefs on the cases, so I'm going to do my best to respond.  
8 But I don't think there was a lot of new material.

9 THE COURT: Well, so was there new material or was  
10 there not?

11 MR. SAMET: Yes, there --

12 THE COURT: There was new material. All right. So  
13 you asking for a chance to brief a little bit further what  
14 you've just heard?

15 MR. SAMET: Let me see if I can address it.

16 THE COURT: Okay.

17 MR. SAMET: And then --

18 THE COURT: Well, you're not going to get a ruling  
19 from me. When you finish arguing I'm not going to say, okay,  
20 I agree with you. I'm going to have to think about it. And I  
21 heard some very interesting things in this PowerPoint.

22 So, do you want a chance further brief some of what  
23 you've just heard?

24 MR. SAMET: May I discuss at this point?

25 THE COURT: Sure.

1 (Counsel confer.)

2 MR. SAMET: Your Honor, I'm going to do my best to  
3 proceed.

4 THE COURT: Okay, all right. Thank you, go ahead.

5 MR. SAMET: All right. And I'm also going to do my  
6 best to avoid maybe repeating all the arguments from  
7 yesterday. And --

8 THE COURT: I guess I want to say --

9 MR. SAMET: Yeah.

10 THE COURT: -- just to be clear on the Record, if  
11 I'm persuaded by what I just heard, I'm saying this clearly on  
12 the Record, I don't want to see an argument to the Appellate  
13 Court saying that I made a decision based on something that  
14 wasn't properly briefed.

15 MR. SAMET: Your Honor --

16 THE COURT: Okay.

17 MR. SAMET: -- absolutely.

18 THE COURT: All right. I just want to be sure about  
19 that, so. Because I'm giving you the chance if you want to.

20 There are some of this that is covered in Mr. Hord's  
21 brief. I mean, some of the citations to the things that are  
22 being referred to are all there, this connects it up in a  
23 different way than I had thought about it before.

24 MR. SAMET: It does. And that's why -- and I  
25 apologize.



1 THE COURT: Okay.

2 MR. SAMET: I'm not trying coy. I haven't gone back  
3 and matched exactly to the replies.

4 THE COURT: Okay.

5 MR. SAMET: I'd like to proceed here, Your Honor --

6 THE COURT: Go ahead.

7 MR. SAMET: -- I'm not trying to play games.

8 THE COURT: Thank you. I have no doubt about that.

9 MR. SAMET: Okay.

10 THE COURT: You've been terrific both days. So go  
11 ahead.

12 MR. SAMET: All right. But I didn't think -- I was  
13 going to say that I thought particularly on the issue of 546,  
14 you know, I thought that the presentation didn't entirely --  
15 wasn't entirely fair to the points that I was going through,  
16 especially in the Order and what's going on here.

17 And I thought to organize myself, though, just to  
18 avoid repeating, repeating all of that, maybe I would organize  
19 by the presentation itself.

20 THE COURT: Okay.

21 MR. SAMET: The first issue is with respect to the  
22 timeline. And my client, the Trustee of the Fury Litigation  
23 Trust, came into existence on June 30th, 2020.

24 THE COURT: Okay.

25 MR. SAMET: All right? The Final Decree is entered

1 on July 1st, and I could be wrong, but it might even be signed  
2 on June 30th. It is -- as we talked about yesterday, it is  
3 referenced in the Plan that the Debtor is going to make this  
4 motion, Section 4(w), I believe.

5 THE COURT: Okay.

6 MR. SAMET: And it's all being coordinated together.  
7 And of course -- and I'm going to talk about this in more  
8 detail later on. The reason that the Debtors are saying you  
9 can close this case, they're saying is because the trust has  
10 the claims, those actions are going to be prosecuted through  
11 the trust. And so this -- that's how this that's how this  
12 works.

13 Second, with respect to Bankruptcy Rule 3022 -- I'm  
14 sorry, I didn't get that out. I understood that counsel is  
15 making reference to the Debtor's motion to close in the case.  
16 But I do want to point out that in both the motion, and in the  
17 Order itself in great detail, it is not over, the case is not  
18 over. The claims of the remaining matters, which as we talked  
19 about, I think I read it into the Record. I have the  
20 paragraph number here, paragraph 16 of the Debtor's motion  
21 with the definition --

22 THE COURT: I've got it. Your argument would be  
23 representations about it being fully administered or accurate  
24 at that time. But part of that administration was giving  
25 these claims specifically to the trust with the understanding

1       that they're going to be brought, and that isn't something  
2       that keys to the concerns being raised by 546.

3               MR. SAMET: That's correct.

4               THE COURT: Okay.

5               MR. SAMET: And in addition, Your Honor, the other  
6       reason why is that the issues that are not going to be brought  
7       by the Trust are going to be brought in the parent case in the  
8       *Cornucopia* case, which everyone agrees is open. All right?  
9       And then that's why -- and those remaining matters are claims  
10      objections, those are fee objections, those are all the  
11      miscellaneous things that have to be done, is there any party  
12      that wants to be heard? Those matters are still open.

13              And, in fact, pursuant to -- it's not just, it's not  
14      just, it's not just section -- paragraph 5 of the Order that  
15      says it is without prejudice to the cause of action. It's  
16      paragraph 4, the remaining matters are going to proceed in the  
17      case. It's paragraph 7, that all further reporting is going  
18      to occur in the Cornucopia case. That there's going to be  
19      actually a docket entry made that anything is going to  
20      continue in the *Cornucopia* case?

21              And paragraph 11, any objections to claims or  
22      interest in the closing Debtor is filed, administered, and  
23      adjudicated in the remaining case. And of course the  
24      catch-all provision in paragraph 12.

25              And so it's fully administered, but with those two

1 big *provisos*; the one that Your Honor just mentioned, and of  
2 course these, that is simply not -- it's continuing to be  
3 administered and it's continuing to be open.

4 And again, this isn't that it's continued to be open  
5 in some random other proceeding or in some other outfit. It's  
6 100 percent parent case, it's that they're -- all three cases  
7 are being jointly administered in that proceeding. And I  
8 believe in our papers, we cited Your Honor, we put in a  
9 declaration with the joint administration order.

10 And again, the Plan itself is a single Plan of  
11 Reorganization, it's 108 pages that takes -- we went through  
12 this yesterday, too. It takes all the assets of the --  
13 because it's all 100 percent owned with the different  
14 entities, all the liens and claims, and recombines them and  
15 sends them to different places.

16 So where that's taking me through, Your Honor, is  
17 that this idea that somehow the Bankruptcy Code -- the  
18 Bankruptcy Court was contravening an order of Congress, I  
19 really think is not -- I actually don't quite understand it,  
20 that that's not what is -- they are administratively closing  
21 this case for the convenience. And probably, as Judge Isgur  
22 pointed out, to save on paying U.S. attorney fees, because if  
23 you keep a case open, then even though the debt is closed and  
24 new company is going on and the claims are being prosecuted by  
25 the case, they don't want to keep paying hefty fees based on

1 the original assets of the case in bankruptcy.

2 And so this -- what I really think counsel -- to the  
3 extent that counsel is making an argument, is an argument  
4 against the case closure order. That to say, well, the case  
5 shouldn't -- it shouldn't have said case closed. You should  
6 have kept -- if you were having the remain matters going to  
7 the parent and if you were having the State claims going to  
8 the trust, Judge Silverman shouldn't have closed the case.  
9 And that was wrong under Rule 3022, and maybe it's wrong  
10 pursuant to counsel's constitutional argument or statutory  
11 interpretation argument.

12 But again, and this takes me to have slide 9 of the  
13 debt, which is --

14 THE COURT: I will say, I mean, I agree that the  
15 argument that I heard was technical argument. And in terms of  
16 I'm still thinking about humdingers -- is that, you know, but  
17 if you go foul, you go foul on these statutory things. And I  
18 mean, that's -- it's like, look, if you want to do things a  
19 certain way and there's a statute that tells you how you have  
20 to do it, then you need to meet each of those things. And  
21 it's not really a criticism to say, hey, a lawyer stood up and  
22 made sure that you actually did all of the exact things that  
23 you needed to do. That's the job.

24 And so, I mean, I'm going to take a look at that. I  
25 hear you talking about sort of intent and big picture, which I

1       also understand, but there's a statute that I'm going to have  
2       to be dealing with.

3               MR. SAMET: Well, hold on a second, Judge, because  
4       this is exactly --

5               THE COURT: So now we are on page 9 where do you  
6       want us to go. Okay, go ahead.

7               MR. SAMET: Again -- and this is a general  
8       proposition when you've got contracts. But contracts  
9       documents should not be interpreted to render them illegal and  
10      unenforceable, or the wording leads them to a logically  
11      acceptable construction that renders them legal and  
12      enforceable. All right? I agree with that. And I think  
13      going back, there's nothing in here about 105, about  
14      overruling the Bankruptcy Code. In fact, they don't have a  
15      claim that says that was an illegal Order. They say that --

16              THE COURT: Let me ask this, let me ask this,  
17      though.

18              So let's assume that the theory aspect of these --  
19      there's three bankruptcy proceedings that were going forward  
20      or being separately administered, and now there's just the  
21      parent *Cornucopia*. The other two were --

22              MR. SAMET: They were always being jointly  
23      administered, but the parent and the two 100 percent  
24      subsidiaries each had their own bankruptcy docket.

25              THE COURT: All right. And so, and they were

1 closed. Let's assume that it was to avoid payment further  
2 fees to the U.S. Trustee. Is that the only reason that they  
3 were being closed?

4 MR. SAMET: Well as -- and to be honest, I'm not  
5 pulling that from an intent, a lawyer's intent. But the  
6 motion goes through they're closing it -- why they're closing  
7 it, for administrative convenience. I mean, that's what  
8 the -- that's what the motion is saying.

9 THE COURT: Sure.

10 MR. SAMET: And, in fact, that's why it comes back  
11 to this conditional, on this condition. It says, if the  
12 assets aren't transferred, don't close this case. And again,  
13 I think the logical import of counsel's argument, though, from  
14 a technical perspective that I heard, is that the case should  
15 be reopened and that it should never have been closed in the  
16 first place, which of course means if it never was closed in  
17 the first place, then I'm not sure what we're talking about.

18 Again, 546 says -- 546 doesn't have anything to do  
19 with any similar requirement about what needs to be in the  
20 case closure order. All it says is, is you can't bring  
21 fraudulent transfer claims after the case has been closed or  
22 dismissed. And our argument, Your Honor, is that the case has  
23 simply not been closed in the meaning of that statute, it is  
24 open.

25 THE COURT: Because *Cornucopia* is open.

1 MR. SAMET: That's right. Anything you wanted to do  
2 in that case you can do in the *Cornucopia* action. All right?  
3 With the exception, of course, of the fraud and transfer  
4 claims, which the order is preserving for us to bring in  
5 appropriate forum.

6 So that is our argument. And that's why I don't  
7 agree with what I heard here, that somehow the Bankruptcy Code  
8 was exceeding something by allowing the Trustee to bring the  
9 claims.

10 THE COURT: Okay.

11 MR. SAMET: There was also an argument about -- and  
12 that's what I thought it was interesting that counsel's next  
13 slide talked about intent and how that was a distinction and  
14 the *Vanguard* case is closed to hear.

15 And on page 13 counsel quoted from the *Vanguard*  
16 decision saying the Court intended to continue administration  
17 of the estates. And again, that's what we're pointing to Your  
18 Honor. I don't think there's a question now about Judge  
19 Silverman's intent. It says in paragraph 4 the main matters  
20 are going to be, are going to be continued in the *Cornucopia*  
21 case, and all the other arguments cited in there. And so --

22 THE COURT: Okay.

23 MR. SAMET: So that is my -- and let me add to what  
24 I said yesterday, Your Honor. It is my rebuttal to that, to  
25 the presentation on that point.



1 THE COURT: Okay.

2 MR. SAMET: Let me move to the presentation on the  
3 operating agreement. And I don't think -- I think this is a  
4 similar argument. I don't presuppose to keep --

5 THE COURT: It is, I would just say, can you --

6 MR. SAMET: -- very briefly.

7 THE COURT: *L3 Communications*, I think we talked  
8 about that some yesterday. But can you give me your take on  
9 that case? And I think the other two follow from that.

10 MR. SAMET: I was on going as well on it. I just --  
11 take me out of my order. Hold on one second. I'm sorry.

12 THE COURT: Yeah.

13 MR. SAMET: This is allowed, it's allowed, I'm  
14 just --

15 THE COURT: In terms of what I heard additional to  
16 yesterday, we were focusing on the L3 case.

17 MR. SAMET: Well, I was going to talk about it,  
18 that's fine, and then I'll go back.

19 THE COURT: Okay.

20 MR. SAMET: Well, if Your Honor will just let me get  
21 a half a second --

22 THE COURT: Yeah, go ahead.

23 MR. SAMET: Because I think leading into the *L3* case  
24 on slide 15, counsel is pointing out that both the third and  
25 the fourth state -- that amends and restates the previous

1       agreements in their entire. That's obviously -- it says that  
2       in there.

3               And again, I just want to point out, our main point  
4       is that it amends and restates in their entirety effective as  
5       the dates on the document. That's our argument. I'm not  
6       going to repeat that.

7               THE COURT: Okay.

8               MR. SAMET: I think -- and on the *L3* case, and I  
9       also on the next cases as well. These are cases that come  
10      from the realm of contracts. I think we talked about  
11      novation. That was a new argument probably.

12              But I think I can talk about it here, too. Novation  
13      and when parties have -- and I don't remember the specific  
14      case in as great detail. But when parties are putting in  
15      language that they're superseding a previous agreement, two  
16      parties, all right? There are all sorts of doctrines in the  
17      law as to how you handle those situations.

18              Mr. Hill talked about, if you look -- sometimes you  
19      look at the facts and circumstances, right? What's going on  
20      here? In the *DG* case we talked about the other day, they had  
21      changed an investment over into an operating agreement and  
22      they put in an integration clause, and then they said, okay,  
23      you've given up your previous rights, we're going under this  
24      document now.

25              And, you know, what we're saying here is that this

1 is not a contract that the parties then continued operating  
2 under. They're trying to say there's a retroactive  
3 exculpation to a time when the company was operated in a  
4 different manner. And there is just simply no doctrine in  
5 law, in Delaware law, about what retroactive exculpation  
6 might mean.

7 We have doctrines as to, you know, when we talk  
8 about novation and what happens when a contract is novated.  
9 And we have documents when people have letter of intents, and  
10 then they have an original letter of intent, and then they go  
11 onto a second letter of intent. All right? There's cases  
12 available about that.

13 THE COURT: Well, we're looking at that -- I think  
14 it's paragraph 9 of the LLC.

15 MR. SAMET: I see it --

16 THE COURT: I think it's paragraph 9. I don't have  
17 it before me anymore.

18 It's not -- it doesn't have to do with exculpation  
19 or release. In fact, it doesn't really talk about suit or the  
20 ability to sue at all. But what I'm understanding it, when  
21 you're talking about as to who that paragraph pertains to,  
22 that they no longer have duties. That's insulating them from  
23 the ability of who to bring suit against them. Is it the  
24 company would be bringing suit against its officers,  
25 directors, et cetera, or is it somebody else?

1 MR. SAMET: Well, it's --

2 THE COURT: Because it's breach of fiduciary duty  
3 and it's the fiduciary duty that's owed to the company.  
4 Right?

5 MR. SAMET: It's the -- the paragraph 9 says that  
6 they shall not have a fiduciary duty to the company.

7 THE COURT: Okay.

8 MR. SAMET: It's typically the case, just to answer  
9 Your Honor's question.

10 THE COURT: Yeah. And so I look at that, it's not  
11 that it's entitling or disentitling the company to do anything  
12 as of a specific time period. It seems to me like it's  
13 saying, you know, once that provision is in place, it's saying  
14 what the company can do *vis-à-vis* these people.

15 And I mean the argument that I'm getting is that the  
16 company just can no longer bring those types of suit against  
17 its people, ergo litigation trust who's standing in the shoes,  
18 the company can't do that.

19 And so I don't see, I honestly, I don't see with the  
20 amended and restated that it's a question about, well, what  
21 was exculpated in the past? It's more talking about as of,  
22 effective as of that date that it's happening, what can the  
23 company do against its officers and directors?

24 And I'm not sure it has the ability anymore to say  
25 that there's a duty that was breached.

1 MR. SAMET: Well, I'd like to respond. I'd like to  
2 respond in two ways. And I think it's an important argument,  
3 so I apologize.

4 THE COURT: No. Yeah, it's a big argument.

5 MR. SAMET: Again, it's our read of the contract  
6 that is saying --

7 THE COURT: Again, it's technical, and I sit here.  
8 I don't like reading a document that says you can breach all  
9 the fiduciary duties, you can violate your fiduciary duties at  
10 will and nobody can sue you for it. I don't like that. But  
11 the Delaware statute says we're going to give parties the  
12 ability to do it to the maximum extent by contract.

13 And so, it really doesn't really matter what I  
14 personally think about it. It's like, what does that law  
15 require?

16 MR. SAMET: Let me make my arguments.

17 THE COURT: Yeah.

18 MR. SAMET: My argument is, first, that the plain  
19 reading is that going forward these officers, if they want to  
20 know how they should conduct themselves going forward, they  
21 shall have no duty, fiduciary or otherwise, to the common.

22 All right. Now, I will also point going forward,  
23 the officers are going to be subject to a board that's under  
24 this agreement as well. All right? Going forward they're  
25 going to be subject to a board, which has independent

1 directors and the lenders can sit on it.

2 And so, that would answer Your Honor's question as  
3 to, well, who in their right mind would not have a fiduciary  
4 duty, but now they're going to be subject to supervision.

5 So, our read of the contract, is that from this date  
6 going forward, if you want to know how to conduct yourself,  
7 you have no fiduciary duty to the company and there's going to  
8 be a board in place.

9 And that takes me to my next point, which is, if you  
10 look at the agreement it's not just section 9 that we're  
11 saying it's like that going forward. It's every section.  
12 It's every section is like that.

13 I'll used the fourth provision because we were using  
14 the fourth yesterday. But it's section -- and we can look at  
15 them all, Section 5, it's going to be a company and  
16 registration state Delaware. Obviously had a registration in  
17 Texas before that, it's a Texas company. Got a mailing  
18 address, that's going to be perspective. Got a management  
19 company 7(a), it's going to be directed by a board of  
20 directors. All right? 7(b).

21 All of these -- all of this -- everything this  
22 document is looking for is how is this company going to be  
23 operated going forward? And my interpretation, apparently all  
24 these learned gentlemen think otherwise, is that if you want  
25 to know how the company's going to be operated going forward,

1       this restates the entire operating agreement. You're not  
2       going to look to anything else. You're going to look to this  
3       document.

4               THE COURT: As of the date.

5               MR. SAMET: As -- well, not as is. It says is  
6       effective as of this date.

7               THE COURT: Right. That's what I meant.

8               MR. SAMET: Effective as of this date. All right?

9               There's no integration clause that says supersedes  
10      any prior conflict. And I would also just say, as a matter of  
11      course, parties need to know when they take actions, what  
12      governs them. And I would say, think about the opposite  
13      situation, Your Honor, if this had said -- if the previous  
14      document, when they took the actions, and they did these  
15      transactions with the Randolph tax credits with the gas, if it  
16      had said you have no fiduciary duty and then afterwards they  
17      said, we're restating it back and now you have the most  
18      onerous fiduciary duty.

19              Could it really stand in my shoes and say, well, now  
20      they're liable. I've just restated it. They would say, well,  
21      of course not. When I took those actions, I was relying on  
22      it.

23              And again, with respect to Mr. Hord, in particular,  
24      and we pointed this out in the brief, it's just -- it's  
25      peculiar to us. He has an employment agreement. He submitted

1       that agreement to the Court. He denominated his motion for  
2       summary judgment. You know, he doesn't say I understood it.

3               In fact, I think counsel just got up and said, he  
4       didn't -- wasn't participating in this. He submitted his  
5       employment contract. It's an employment contract under Texas  
6       law, he's going to fulfill his duties faithfully and  
7       diligently under Texas law.

8               And this argument, this argument that this has --  
9       that this document now goes back in time and says, well, no,  
10      all that was different. I find it difficult to say, how is  
11      that going to be applied? And I will come back, and there was  
12      a lot of this yesterday, and I don't need to re-argue this,  
13      but.

14              THE COURT: I mean, you're going to get everybody  
15      out in the benches --

16              (Laughter.)

17              THE COURT: -- to rush the stage at this point.

18              MR. SAMET: There is a lot of cases that have been  
19      thrown around about what restated operating agreement means,  
20      about what an exculpation means. Although I will point out  
21      all the cases, they have different clauses, and that's what I  
22      was going to say about the *L3* case, which is where we started.

23              THE COURT: Yeah. It where we --

24              MR. SAMET: You have to look at the -- when you're  
25      looking at a contract, you have to look at the specific



1 contract and the specific language. Does it say entered into,  
2 does it say, as of, does it see effective, does it say a  
3 limit, does it say, shall or have none, or what's going on.

4 And, no one has a case where someone went back and  
5 said the operating agreement, know everything that happened  
6 beforehand. All right? Was completely now you can't bring it  
7 anymore.

8 And I suppose that goes for us as well. I suppose  
9 that -- you know, I'm not being, we've had a lot of argument  
10 about that. We don't have this exact situation.

11 So without repeating the arguments I made about the  
12 statute and why that affected it, I think has meaning under  
13 Delaware law. That's our argument on this, Your Honor.

14 THE COURT: Okay. Either way the Delaware Supreme  
15 Court's ultimately going to have something to say about  
16 whenever I rule on this issue. They'll tell me either I was  
17 right or wrong.

18 Anything else?

19 MR. SAMET: You know, I did. If I could just put  
20 one thing on the Record also, which I forgot to say, which is,  
21 I do think that in looking at it, and with respect Your  
22 Honor's question, I would put out there that before -- we  
23 talked yesterday about releases, is it releases in our  
24 release.

25 But I would say the same thing, before you eliminate

1 fiduciary duties for past actions, I think this Court or any  
2 Court though, should really --

3 THE COURT: It should be clear.

4 MR. SAMET: -- should be clear. Thank you.

5 THE COURT: Thank you.

6 MR. STOGER: May I respond briefly, Judge?

7 THE COURT: Of course.

8 MR. STOGER: Thank you.

9 Judge, as I said in the reply brief, it's just  
10 inconceivable to me that Fury would file motion to close their  
11 bankruptcy case; that the Bankruptcy Court would hold a  
12 hearing on it and the Bankruptcy Court would enter a Final  
13 Decree, closing the case all to no effect. I mean, I think  
14 that the Order means what it says, that the case was closed.  
15 I mean, it's just beyond my understanding that they would've  
16 gone through all these steps and not actually intending for  
17 the case to be closed. I think it means what it says.

18 A couple of other points: I think one of the  
19 purposes of a litigation trust is to move the litigation out  
20 of the bankruptcy estate into litigation trust to bring, and  
21 that tunes into the whole idea of closing the bankruptcy case.

22 And you know, the other point, I think this is a  
23 binary question, it's --

24 THE COURT: Well, so where do you go with that  
25 thought, though? What is that? By saying that, what do you

1 mean by that? It moves into litigation trust to bring the  
2 claim, which is what they did.

3 MR. STOGER: Yes. They moved it to -- I'm sorry,  
4 Judge.

5 THE COURT: And so, but they needed to bring the  
6 case before the main case was closed.

7 MR. STOGER: Yes, absolutely. Nothing prevented the  
8 litigation trust from bringing this case before the bankruptcy  
9 estate. Because really nothing prevented Fury from filing  
10 this case years ago. I mean, the bankruptcy -- the litigation  
11 trust just stands in the shoes of Fury. But the Fury itself  
12 could have brought this case. They didn't have to wait for  
13 litigation trust. I mean, it was -- I think it was a Debtor-  
14 in-possession. There was no Trustee in the labor. Energy  
15 Capital Partners was essentially in control of the case.

16 And my understanding, really, from reading the  
17 Chapter 11 Plan is, I think that any recovery by the  
18 litigation trust would flow to Energy Capital Partners and  
19 maybe some other lenders as well. I wasn't exactly clear. My  
20 understanding is the main beneficiary of all this litigation  
21 is the chief lender.

22 And also I think that kind of feeds into Your  
23 Honor's concern about the fiduciary duty clause.

24 Also my understanding was that the lender put this  
25 board of managers in place, the one where these, the third and

1 the fourth operating agreement was adopted, they put this  
2 board of managers in place so they could exercise control.

3 So again, it wasn't as if the operating officers  
4 just ran out and adopted this and, you know, were trying to  
5 eliminate everything. And I think the truth of the matter  
6 was, it was the chief lender that they came in, forced  
7 installation this board of managers. I think, it was  
8 Mr. Rieck, I think it was Mr. Broadsky (phonetic) for Energy  
9 Capital Partners, and then there was an independent manager as  
10 well.

11 So my understanding is that the third and fourth  
12 agreements were adopted, probably drafted, I don't know that  
13 for a fact, by Energy Capital's partners. But I'm assuming  
14 that it was either drafted by them, or at least they had  
15 significant input into adoption of the third and fourth  
16 agreement.

17 And also they talked -- when they talked about  
18 private consolidation. There was procedural consolidation  
19 here, not substantive consolidation of bankruptcy cases. We  
20 talked about it in briefing. But legally these are two  
21 separate companies. I mean, you have *Cornucopia* as the -- I  
22 think the parent company that Fury is a subsidiary of. And  
23 there's never been any argument for alter ego in this regard.  
24 The corporate form here they were filed under separate  
25 bankruptcy case numbers, I believe. So, I mean, these were

1 two separate, fully separate legal entities for all purposes,  
2 no alter ego, no piercing the corporate veil.

3 And also, when you talk about Delaware law here, but  
4 the way I see it, there was two hoops to cross through. The  
5 third agreement was actually adopted when this was a Texas  
6 corporation. So the first hoop to cross through is Texas law  
7 and how the fiduciary duty clause would be treated under Texas  
8 law. And then I think if Fury crosses through that hoop, then  
9 we get to Delaware law.

10 I can't say I've seen a significant difference  
11 between two states on these issues, but I thought I would just  
12 point that out.

13 THE COURT: Okay.

14 MR. STOGER: So there's two different hoops to cross  
15 through here.

16 And then the final point on this: With the closure,  
17 I mean I'm going say this is judicial *estoppel*. I mean,  
18 although perhaps not fully, but you know, Fury represented to  
19 the Bankruptcy Court that the case had been fully administered  
20 and asked for closure.

21 And I saw in their motion, they said the only  
22 remaining matters anticipated for resolution were final fee  
23 applications and claims objections. You know, for all intents  
24 and purposes the case was closed by Order.

25 So just to close on that point, I would just say the

1 Order means what it says. They vote 350, it says it's closed.  
2 They asked for closure many times in the motion, the Order of  
3 the case was closed under Section 546.

4 THE COURT: Okay. I got it.

5 MR. STOGER: And then --

6 THE COURT: I get your argument. Okay. Thank you.

7 MR. STOGER: I think that covers. And, again, I  
8 think I've covered -- and you know, we've already touched on  
9 the fiduciary duty.

10 THE COURT: Okay. Yeah, and I think I've got  
11 everything there.

12 Mr. Samet, anything else? I think I've got it.

13 MR. SAMET: No, Your Honor.

14 THE COURT: All right. Thank you.

15 All right. So what I have left, let me hear all  
16 arguments that Mr. Ganer and Sierra Pines wish to bring. And  
17 I have that there's some aspects as to Rule 9, as to Rule 8,  
18 I guess pleading as to pleading of a fiduciary duty, and then  
19 aiding and abetting breach of fiduciary duty.

20 So, let's take them all up. They're spaced out on  
21 my outline, but let's just do them all.

22 And Mr. Samet can then scramble further.

23 (Laughter.)

24 THE COURT: Go ahead.

25 MR. SAMET: I've got an outl, too.

1 MS. DANG: Thank you, Your Honor.

2 Just a little bit of background of who Sierra Pines  
3 is and who Mr. Ganer is. And since this is a Rule 12(b)(6)  
4 we'll kind stick of kind of the pleadings as well.

5 What we know from the Plaintiff's pleadings is  
6 Sierra Pines is a third party consulting firm that Fury  
7 retained to provide these reservoir reports. Mr. Ganer was  
8 the owner of Sierra Pines. And, in fact, Plaintiff's  
9 response, Docket Number 87, page 4, admits that Mr. Ganer did  
10 not have a formal role at Fury.

11 And so when we talk about their breach of fiduciary  
12 claim, that there's two avenues in which a breach of fiduciary  
13 duty claim we establish either formal or informal.

14 For their formal role. They've stated that because  
15 Mr. Ganer operated, or at least held himself out to be an  
16 internal geologist and had access to confidential information,  
17 that that somehow rises to a formal fiduciary relationship,  
18 and that's not the case.

19 In fact, the Fifth Circuit in *Jacked Up, LLC versus*  
20 *Sara Lee*, stated that just because a confidential agreement  
21 even exists, something such as an NDA, a licensing agreement,  
22 any agreement that requires confidentiality does not  
23 automatically create or give rise to the fiduciary duty.

24 Now, the two cases that were cited was *Hunter versus*  
25 *Shell and Lloyd versus Pendleton* (phonetic) to somehow support

1       that because a geologist has confidential information and  
2       automatically creates a fiduciary duty, but that's not what  
3       those cases say. In fact, in *Hunter versus Shell*, the issue  
4       there was that Hunter was a geologist employed by Shell in  
5       which Shell had a company rule that you could not then go buy  
6       mineral or royalty interest that you had discovered while your  
7       time working there. And Shell, in fact, then later learned  
8       that Hunter was divulging that information of third parties.  
9       And, in fact, using shell corporations to buy interest in this  
10      name, that's not what we have here.

11               In *Lloyd versus Pendleton*, that was an issue where  
12      the geologist there admitted that he had a quasi-joint venture  
13      with the Pendletons, and the Pendletons also testified at  
14      trial that they view him as a close family friend, which the  
15      Court then said the trial Court should have submitted that  
16      question at least to the jury. So those two cases sided to  
17      support somehow just because of geologist --

18               THE COURT: Let me as for Mr. Ganer.

19               MS. DANG: Yes.

20               THE COURT: In my notes here, I have a paragraph  
21      down incorrectly from the first amendment complaint, because  
22      it's not paragraph 150.

23               But isn't there an allegation that Ganer was either  
24      a named officer or a *de facto* officer of Fury?

25               MS. DANG: There is an allegation that simply



1       classified him as a *de facto* officer of Fury. But --

2               THE COURT: Okay. So -- well, what's the but? But  
3       if you want to proved to me by evidence later that that's not  
4       so, your motion's denied. So why does that not sufficiently  
5       plead to go forward as to that claim?

6               MS. DANG: Because in that specific paragraph, that  
7       is where the Plaintiff wants not just Mr. Ganer, but all the  
8       other, Mr. Hord, Mr. Ganer, other folks saying that they are  
9       now officer Defendants is what it's classified. In  
10      Plaintiff's response --

11              THE COURT: What paragraph is it? Do you have the  
12      paragraph.

13              MS. DANG: Yes. It is --

14              THE COURT: And, Mr. Samet, if you know, you can let  
15      us know. No? Okay.

16              MR. SAMET: I do, but I would cite the Court to  
17      paragraph 25 in the first instance.

18              THE COURT: Okay. Is that what you were having in  
19      mind or was it something else?

20              MS. DANG: I don't believe it was paragraph 25.

21              THE COURT: That's just the definition for  
22      Mr. Ganer.

23              MS. DANG: Yes. Yeah, 25 is just the definition of  
24      Mr. Ganer. But when we look at what is going to be -- and I  
25      apologize, Your Honor -- I believe it is paragraph 165.

1 THE COURT: 165. Thank you.

2 MS. DANG: Yeah, 165 is aiding and abetting and 150  
3 is the definition. So just to be clear.

4 COURT CLERK: 169.

5 THE COURT: 169. Well, wait. Yeah. Okay. So 169.

6 I'm looking at Plaintiff's first amendment  
7 complaint, Docket 155, paragraph 169, which is right when the  
8 first cause of action for breach of fiduciary duty begins.  
9 Hord, Nunes, Stephoudt, others, including Ganer, were either  
10 named officers or *de facto* officers of Fury.

11 Okay. So why is that not clear enough? I mean, it  
12 articulates it. It is then discovery that can be taken on  
13 that and I can later determine whether that is or is not true.

14 But what is it about that, with everything else said  
15 about him in advance, that that's not enough to invoke the  
16 concept of a fiduciary duty?

17 MS. DANG: Well, one, Your Honor, even in  
18 Plaintiff's own response to that, states that he did not have  
19 a formal role at Fury. There is no allegation that he was  
20 receiving some sort of salary, as what they have alleged to  
21 the other Defendants.

22 And another reason why that's not sufficient is  
23 simply because he may be an officer doesn't automatically  
24 impute some sort of fiduciary duty. And here, taking kind of  
25 what they've said, what he's done, aside, that's still simply

1 not enough for a formal fiduciary relationship.

2 THE COURT: Okay. I'm given some -- were you here  
3 yesterday?

4 MS. DANG: I was not, Your Honor.

5 THE COURT: Okay. Only on a couple of them have I  
6 indicated sort of what I think in a definitive way.

7 I do think it's pretty thinly pleaded, but I do  
8 think that the argument you're raising is something that's  
9 probably going to be better heard on summary judgment. I  
10 think you may have something there. But I think there's  
11 enough to go forward on that.

12 That's my -- I'm going to look further at your  
13 arguments on it. But that's kind of what I'm thinking about  
14 it right now.

15 MS. DANG: Okay. Now, I'll be really brief on the  
16 informal fiduciary.

17 THE COURT: Okay.

18 MS. DANG: Because the other avenue of having that  
19 relationship is if there is an informal one.

20 As we know, Texas Courts have held that in order to  
21 have an informal fiduciary relationship, it has to arise  
22 separate and apart from the business relationship itself. And  
23 here, in the pleading itself, there is no allegation of an  
24 informal fiduciary relationship. There is no allegation that  
25 Mr. Ganer or Sierra Pines had some social, close personal

1 relationship with Fury. So we don't get there under that.

2 THE COURT: Okay.

3 MS. DANG: And then the other point would be under  
4 aiding and abetting.

5 So we do agree with Plaintiff that while aiding and  
6 abetting is not a real cause of action, there is a cause of  
7 action called the knowing participation in breach of fiduciary  
8 claim --

9 THE COURT: Right.

10 MS. DANG: -- which is a mouthful. So we agree with  
11 them on that. I think our issue with that is the way that  
12 it's pled is just Defendants, Officer Defendants. Who are we  
13 assisting, knowingly participating in their breach? That's  
14 where we get the Officer Defendants that are defined; that's  
15 Hord, Nunes, Van Stephoudt, Elder, and another party I cannot  
16 pronounce. But because of that we have no clarity as to who  
17 we have allegedly assisted in breaching what their fiduciaries  
18 are, if they have one, and what did he do?

19 THE COURT: Okay. And that's as to -- I'm looking,  
20 trying to find -- which cause of action?

21 MS. DANG: Aiding and abetting, it is the second  
22 cause of action --

23 THE COURT: Second cause of action --

24 MS. DANG: -- on the Plaintiff's first, or I guess  
25 original complaint.

1 THE COURT: Hold on one second.

2 Okay, all right, thanks. I got that. I'll take a  
3 look at that.

4 MS. DANG: And I guess our second bucket of argument  
5 is related to the fraudulent transfer claims.

6 THE COURT: Yes.

7 MS. DANG: And so the first one is the actual  
8 fraudulent transfer under both the Texas statute, as well as  
9 the federal statute. And under that is Rule 9(b) requires  
10 that for that claim to be plead with specificity. And, in  
11 fact, in *Campbell versus Texas Tea*, which was a case decided  
12 by Judge Edison in 2021, he applied rule 9(b) to a fraudulent  
13 transfer claim.

14 He stated that it required pleading of the transfer,  
15 the initial transferee, the date of the transfer, the amount  
16 or value in consideration paid, if any. Here we don't have  
17 that. All we have in Plaintiff's complaint, in paragraph 172,  
18 is just a blanket answer or blanket statement that 3.8 million  
19 was transferred at some point in time. We don't know who.  
20 Was it to Sierra Pines? Was it to Mr. Ganer? What was the  
21 date?

22 And, in fact, in *Campbell*, Judge Edison stated that  
23 in that complaint, the allegation that the fraudulent  
24 transfer, quote, "took place within a four-year range was not  
25 specific enough to meet the Rule 9(b) standard."

1           As to constructive fraudulent transfer, Courts have  
2 then held that that is only required under Rule 8. And our  
3 issue there is because there's no kind of clarity as to what  
4 and when the transfers were made, we don't know whether or not  
5 to negate, if it was for reasonably equivalent value.

6           THE COURT: Okay.

7           MS. DANG: And, in fact, Judge Edison in that case  
8 also says: Simply stating that without further facts is  
9 damaging.

10          THE COURT: Which case is that?

11          MS. DANG: *Campbell versus Texas Tea*, I have a copy  
12 of the case if Your Honor would like that?

13          THE COURT: Okay. And that's Judge Andy Edison not  
14 Keith Ellison.

15          MS. DANG: Yes.

16          THE COURT: I just want to be sure, Andy Edison.  
17 Okay.

18          MS. DANG: Edison.

19          THE COURT: All right. Thank you.

20          All right. Anything else?

21          MS. DANG: That is all, Your Honor.

22          THE COURT: All right. Mr. Samet?

23          MR. SAMET: Okay. Briefly in the Order.

24          THE COURT: You have starting with the fiduciary  
25 duties.

1 MR. SAMET: You know, we've -- let me back up.

2 We've sued Mr. Ganer and his company SPRI on a  
3 number of alternative theories, and that that certainly  
4 arising from his somewhat unusual position in the company.

5 And I would direct Your Honor to paragraph 25 of the  
6 complaint. We do introduce him, but we also state that he is  
7 Fury's internal geologist, which is an important role. And  
8 that's why we cited those Fifth Circuit cases, which I've  
9 recognized here in jury trials, of whether internal geologists  
10 at oil and gas extraction companies is a very important role.

11 But we also said that he was chief technical advisor  
12 to Mr. Rieck, he report directly to Rieck. He gave  
13 instructions to Fury's employees and consultants, he oversaw  
14 strategic decisions, and he was held out as the Fury's  
15 internal lead geologist to third parties. And that's why we  
16 think that that plead's enough to argue that he's, in fact, an  
17 officer, and also pleads not to argue that he's the type of  
18 control person that has fiduciary duties.

19 And I think in that *Jacked Up* case from the -- the  
20 name is *Jacked Up* --

21 THE COURT: I understand.

22 (Laughter.)

23 MR. SAMET: -- from the Fifth Circuit. Those --  
24 that's the question, which is level of control. Control gives  
25 you -- control is what creates the fiduciary relationship.

1 And I refer the Court for the other authorities I'm going to  
2 add to our brief, and where we also argue it's really not an  
3 issue for pleading. It's an issue for summary judgment, or  
4 maybe even summary judgment, but for trial, it's a fact  
5 intensive issue.

6 THE COURT: Okay.

7 MR. SAMET: Second, with respect to aiding and  
8 abetting. Actually, hold on.

9 You know, the motion, I just want to point out, the  
10 motion only stated, and let me check it too, maybe we'll sum  
11 up. But my understanding the motion only stated that, well,  
12 Texas doesn't have an aiding and abetting argument. I didn't  
13 really go into the whether we had pled knowing participation  
14 in the brief.

15 But I think -- and this is on page 7 of the brief.  
16 We certainly address this in our opposition.

17 We think that the complaint does -- that it does  
18 meet the elements --

19 THE COURT: Of knowing participation.

20 MR. SAMET: -- of knowing participation, and in  
21 particular, how Mr. Ganer and Sierra Pine worked with Fury's  
22 officers to issue inflated reserve reports. And, in  
23 particular, they both understand --

24 THE COURT: Let me ask this. So when I look at this  
25 and write it up, should I be construing it as pleading and



1 knowing participation claim?

2 MR. SAMET: Yes, Your Honor.

3 THE COURT: All right. All right.

4 MR. SAMET: In particular, I just want to point out  
5 for here, and we argue this in our brief as well. You know,  
6 Ganer and Sierra Pine, they both knew they were working for  
7 Rieck's other entities while they were stating in for Fury  
8 reserve reports that they were independent, which is another  
9 fact that we pointed out. And these facts were summarized on  
10 page 7 o four opposition.

11 THE COURT: Okay.

12 MR. SAMET: All right. And lastly, with respect to  
13 the fraudulent transfer claims. I think we covered this a lot  
14 yesterday. We disagree that 9(b) applies to actual fraud,  
15 even if it does apply to actual fraud, it applies -- you know,  
16 what needs to be plead was specificity is the actual fraud or  
17 fraud or a fraud-like scheme. The standard here on our actual  
18 fraudulent claim is intent, is the Debtor's intent to hinder  
19 or delay the false creditors. And we think that's pled with a  
20 lot of specificity in the complaint.

21 Mr. Ganer and his company's activities were very  
22 crucial, instrumental, in that, in those activities. And  
23 that's also detailed in the complaint, and in particular in  
24 paragraphs 106 to 134 of the complaint. And we believe that  
25 -- and again, we're relaying heavily on how the Fifth Circuit

1 in *Jen re: the Outlier* decision, maybe they switched the names  
2 when it went on appeal, you know, and they adopted how that  
3 had been looked at by the District Court, which is if you pled  
4 the fraudulent scheme, you don't have to go through and  
5 itemize each of the transfers.

6 And we also believe on the constructive fraud that  
7 we pled, in quite detail, why Fury was in an insolvent  
8 situation at the time that it was paying them, that it could  
9 not pay back it's secured debt. And it was engaging in the  
10 activities. It was, because they knew they couldn't pay back  
11 their debt.

12 Thank you, Your Honor.

13 THE COURT: All right, thank you.

14 All right. So then last from Helena, the validity  
15 of the -- viability of an unjust enrichment claim here. At  
16 least that's the last thing I have on my list.

17 MR. HADDOCK:

18 THE COURT: And I'm sure everybody wants it to be  
19 the last thing on their list.

20 (Laughter.)

21 MR. HADDOCK: It may be. I think that as they call  
22 things in Louisiana, this unjust enrichment claim, maybe a  
23 little bit of *Lanham Act* at the end of pleadings.

24 (Laughter.)

25 MR. HADDOCK: Anyway, I'm just going to stay focused

1 on the amended complaint in connection between the original  
2 petition and the amended complaint, the eight paragraphs that  
3 really describe this cause of action for unjust enrichment are  
4 identical. The numbering is a little bit different, but  
5 that's the only difference.

6 We believe that, first of all, the Court has the  
7 preliminary question of deciding which law applies, whether  
8 it's Alaska or Texas, and probably the hardest question would  
9 be if Alaska law applies -- and also to choose which law  
10 applies, kind of skipping back here, The Court has to, you  
11 know, look at the application of the conflicts of laws as  
12 applied in Texas, which is adopted the second restatement.  
13 And all of the factors, you know, therein really do lead to  
14 the conclusion that Alaska law probably is the law that  
15 applies in this case. The only factor that leans against it  
16 would be the domicile of Fury.

17 THE COURT: Does the result vary if I pick one state  
18 or the other?

19 MR. HADDOCK: I think the -- well, it's, of course,  
20 an easier decision, I believe, if Texas law applies. But even  
21 in Alaska, it's not a viable cause of action. The key case  
22 out of Alaska is the *Millet* decision from the Alaska Supreme  
23 Court, which really addresses unjust enrichment as a broad,  
24 equitable concept, that really is a prerequisite for  
25 restitution. And then they keep -- you know, they describe

1 the restitution itself as not a cause of action. It's merely  
2 a remedy for various equitable causes of action.

3 And here, nothing has been really, you know, pled  
4 other than unjust enrichment. No claim for --

5 THE COURT: Yeah.

6 MR. HADDOCK: -- any kind of quasi-contract, or  
7 *quantum meruit* has been pled, or anything of the such. And --

8 THE COURT: So you're saying -- the point of your  
9 argument is, there would have to be some other cause of action  
10 pleaded and proved against Helena to stand alone to which a  
11 remedy of unjust enrichment would attach.

12 MR. HADDOCK: Correct. And under the --

13 THE COURT: And am I right, that's the sixth cause  
14 of action, and as to causes of action one through five and  
15 seven through twelve, or whatever it is, Helena's not a named  
16 Defendant in any of those, right?

17 MR. HADDOCK: Right. It's only these eight  
18 paragraphs on this unjust enrichment claim. There's no -- you  
19 know, Helena's not been accused of participating in any  
20 conspiracy or breach of fiduciary duty or anything.

21 THE COURT: Okay.

22 MR. HADDOCK: And then like in paragraph 204, it  
23 talks about how Helena purchased natural gas from Aurora and  
24 paid -- you know, and Aurora purchased, you know, natural gas  
25 from Fury. And the complaint is Fury didn't get paid for the

1 natural gas, you know, but that's a problem -- that if that's  
2 a real complaint, that should have been addressed in the  
3 Aurora bankruptcy. There was no -- nothing resembling a  
4 contract between Fury and Helena in that paragraph.

5 In paragraph 205, where there is a, you know,  
6 general allegation that Helena received gas directly from Fury  
7 for which, you know, no compensation was received. But in all  
8 of these instances, whether no cause of action was really  
9 stated or in paragraph 205 where there's no detail as to how  
10 much gas, how much Fury believes it's entitled to receive, the  
11 pleading allegations, simply don't you know, meet standards of  
12 Rule 8.

13 So under Alaska law, you know, without some  
14 underlying cause of action, you know, whether even if it's  
15 *quantum meruit*, this case has to be dismissed against Helena.  
16 Under Texas law it's clearer because here's a slip authority  
17 amongst the Texas appellate Courts. The two Houston Courts of  
18 Appeals and Texarkana and El Paso say that unjust enrichment  
19 is a standalone cause of action.

20 A bunch of the other Courts say that it is not. The  
21 Texas Supreme Court hasn't weighed in on the issue. In the  
22 Fifth Circuit, you know, the Fifth Circuit acknowledges this  
23 problem and the Fifth Circuit's most recent pronouncement from  
24 2021, in the *Midwestern Cattle Marketing versus Legend Bank*  
25 case, you know, the Court concludes that: Our opinion

1 expressly distinguished the conceptual theory of unjust  
2 enrichment from an independent claim under Texas law for money  
3 had and received.

4 That view aligns with Texas Court's understanding  
5 that unjust enrichment describes the nature of certain claims  
6 and remedies, not a distinct cause of action itself. And so  
7 similarly as Alaska has that problem, the Fifth Circuit would  
8 analyze it in, you know, very much the same way, that what's  
9 asked for is a remedy, but not a cause of action. And we  
10 don't have this basic set of facts and, you know, plead that  
11 would entitle the Plaintiffs to a judgment establishing  
12 liability in order for the Plaintiff to have an ultimate  
13 remedy.

14 THE COURT: Is it ultimately just a formalistic  
15 distinction, though? Because under both laws, quasi-  
16 contracts, *quantum meruit*, however you look at it, I mean  
17 those are viable claims, and then this would be a remedy  
18 attached to that.

19 So is it just a matter of pleading it differently?  
20 As a necessity, are you saying that there's even if we pleaded  
21 to specifically state and elucidate those factors, it's not  
22 enough?

23 MR. HADDOCK: I'm not sure it can be plead  
24 differently. The Plaintiff has had an opportunity to brief --

25 THE COURT: I have no doubt that if I said, look at

1       these elements and plead a cause of action, plead allegations  
2       that attempt to meet those elements, Mr. Samet would know what  
3       it is he's trying to state. And I'm not sure how much it  
4       would vary from what's pleaded already.

5               But I hear you that there's -- you know, it is  
6       styled as unjust enrichment right now, but what it's getting  
7       to is sort of, it's unfair to allow the benefits that were  
8       received to be retained without payment, because of the way  
9       Mr. Rieck was handling that business.

10              MR. HADDOCK: Right. But like in paragraph 204  
11       where it talks about, you know, Aurora being, you know, a  
12       wholesaler, in essence. Any kind of cause of action for like  
13       *quantum meruit* or some sort of quasi contract still requires  
14       something that sort of looks like a contract. But the key  
15       thing it requires is some sort of ascent between the parties  
16       that are dealing with each other.

17              And in paragraph 204 the pleading is clear, Helena  
18       was dealing with Aurora, and that's where the contract  
19       existed. Whereas in, you know, paragraph 205, where it talks  
20       about Helena receiving gas directly from Fury --

21              THE COURT: And remind me about Aurora. Is that a  
22       independent company unrelated to Mr. Rieck in any way or is it  
23       another thing that Mr. Rieck is controlling and has his hands  
24       in?

25              MR. HADDOCK: I think that's been an allegation that

1 Mr. Rieck does have some sort of ownership or control in that  
2 entity. Aurora was a company that went into bankruptcy, I  
3 believe in Alaska, and that's, you know, really kind of where  
4 I think all these unjust enrichment, you know, allegations,  
5 you know, come from here in the present case.

6 But I was kind of talking about, you know, element  
7 of the ascent and all that. All of these equitable remedies  
8 also require as a threshold to show that there's no adequate  
9 remedy of law. So under paragraph 205, where there is  
10 allegedly a direct relationship between Helena and Fury, if  
11 there was, that's a matter that, you know, that primarily  
12 there should be a claim for breach of contract. Natural gas  
13 sales contracts that are required to be in writing under UCC  
14 Article 2, if there is no contract and, you know, it's hard to  
15 imagine that an equitable cause of action under that paragraph  
16 could stand.

17 THE COURT: Okay. I hear your contract-based  
18 argument on that. But then tell me why it's on equity, why  
19 it's just for Helena to receive gas directly from Fury without  
20 paying for it, if I'm looking at it equitably.

21 MR. HADDOCK: Right. And that may be a matter that  
22 then goes you know --

23 THE COURT: There is no argument as to that.

24 MR. HADDOCK: That's probably a matter that, you  
25 know, goes beyond, you know, the mere pleadings here in the



1 scope of what we're doing under rule 12(b)(6).

2 But again, the fact that a cause of action can't be  
3 established under existing, you know, law where no claim for  
4 breach of the contract has been pled or no other, you know,  
5 equitable cause of action has been, you know, pled, you know,  
6 we just have unjust enrichment here --

7 THE COURT: Okay.

8 MR. HADDOCK: -- standing on its own. That's  
9 insufficient and, you know --

10 THE COURT: Okay.

11 MR. HADDOCK: And the Court really should dismiss  
12 the case against Helena for that reason.

13 THE COURT: Okay. You represent Mr. Rieck as well,  
14 correct?

15 MR. HADDOCK: Yes.

16 THE COURT: Okay. You've received the first amended  
17 complaint?

18 MR. HADDOCK: Yes.

19 THE COURT: And have you given it to Mr. Rieck? Has  
20 he seen it?

21 MR. HADDOCK: I believe he has.

22 THE COURT: Okay. Why shouldn't I consider that  
23 sufficient service of Mr. Rieck?

24 MR. HADDOCK: Well, you know, Mr. Rieck hadn't  
25 waived service of process.

1 THE COURT: Okay.

2 MR. HADDOCK: You know, we represent Helena, and  
3 obviously we have -- you know, Mr. Rieck did file a motion  
4 under Rule 12(b)(2) previously. But --

5 THE COURT: Okay. State for the Record specifically  
6 how service can be perfected on him promptly.

7 MR. HADDOCK: I believe that --

8 THE COURT: Is he evading service?

9 MR. HADDOCK: No.

10 THE COURT: Where will he be, so the service can be  
11 handed to him, if you believe that that's something that's  
12 necessary?

13 MR. HADDOCK: I believe that Mr. Rieck is, you know,  
14 is currently in Dubai at his residence, which is, you know,  
15 properly listed the in pleading. And I believe it could be  
16 done under existing or under Dubai law. You know, if a  
17 process server were to fully comply with Dubai law, which is  
18 set forth in -- we have the citation, we have it, too, in our  
19 briefing.

20 THE COURT: Okay.

21 MR. HADDOCK: So if it, and it is a relatively  
22 simple procedure to do that, so.

23 THE COURT: What's the procedure that you think is  
24 so simple to get him served in Dubai?

25 MR. HADDOCK: Well, the process server has to

1 certify that they are over 18. They have to, you know --

2 THE COURT: It's not like serving him in Harris  
3 County.

4 MR. HADDOCK: It's actually probably very similar.  
5 You know, you either have to serve him personally. Or the law  
6 does state that if you can't serve a person personally, you  
7 can serve, you know, a spouse, family member, a housekeeper,  
8 or somebody like that who resides at their residence. And if  
9 you serve one of these alternate persons, you do have to  
10 certify that, you know, that they verify that they're over 18  
11 and have no apparent conflict of interest. So --

12 THE COURT: So I do have that from Plaintiffs, but  
13 then I just now have a counter-declaration from Mr. Rieck  
14 saying, well, everything that they just swore to isn't true.

15 So, does Mr. Rieck want to come here and testify  
16 about that? I'm happy to have him come here if he'd like to  
17 stand behind his declaration.

18 MR. HADDOCK: Well --

19 THE COURT: Or does he not want to do that?

20 MR. HADDOCK: Well, I don't know. I mean, I haven't  
21 talked to him about coming to, you know, to testify about  
22 that. I mean, Dubai is a 10,000 mile flight or something.

23 THE COURT: So I have your supplement, wherein we  
24 just have his declaration where Mr. Rieck essentially says  
25 somebody else is lying. So how do I resolve that factual

1 dispute that you purport to tee up?

2 MR. HADDOCK: I'm not sure what the Plaintiff's  
3 response to that would be. In all fairness, they'd --

4 THE COURT: I'm going to suspect that the Plaintiffs  
5 say, we think our guy's telling the truth about what he said,  
6 and that there was a housekeeper there who accepted it.

7 MR. HADDOCK: Yeah.

8 THE COURT: And you just said to me, if you give it  
9 to a housekeeper, that's enough. And now I have a declaration  
10 though, saying, yeah, I don't have a housekeeper named Tamour  
11 (phonetic), I have a different housekeeper, but she doesn't  
12 live there on premises.

13 How am I supposed to resolve that? When all of it's  
14 towards this fiction that, what he's oblivious to what's going  
15 on here, or can't come here and protect his interests?

16 MR. HADDOCK: Well, again, you know, Mr. Rieck's  
17 entitled to service and process under, you know, the  
18 applicable section of Rule 4. He's not waived service of  
19 process. And --

20 THE COURT: There are lots of entities that are  
21 entitled to, what's due them under the law. All right. I'll  
22 sort that out as to Mr. Rieck.

23 Thank you.

24 Mr. Samet, is there anything that you need to say at  
25 all on these points?

1 MR. SAMET: I would like to make a Record, actually.

2 THE COURT: Okay, go ahead.

3 MR. SAMET: I apologize.

4 THE COURT: No, please go ahead.

5 MR. SAMET: I heard counsel say, and actually I know  
6 why he said it cause Mr. Rieck put it in the declaration this  
7 morning, that the address listed in the complaint in Dubai is  
8 his address. I heard him just say it now.

9 I just want to put onto the Record from the  
10 declaration filed in this case, Docket 32-1, was filed on  
11 September 7th, 2021, paragraph 16, Mr. Rieck stated: However,  
12 I was no longer a resident at the Jumeriah Palm residences.

13 I can -- and then going on, I continued to not  
14 reside at the Jumeriah Palm residences and do not a post  
15 office back in Dubai. And that was the address list on the  
16 complaint.

17 THE COURT: Connect that up for me again. I'm not  
18 following you. When I look at Docket at 184-1, you're looking  
19 at 32-1, did you say?

20 MR. SAMET: I'm looking at 32-1.

21 THE COURT: All right. So --

22 MR. SAMET: The complaint, and this is where we  
23 served at the Jumeriah Palm residences, and I heard from the  
24 declaration filed this morning and from the recitation of the  
25 facts by counsel just now, that Mr. Rieck does live there.

1 But in his declaration filed in September, he said  
2 he was not a resident there. I'd just like to make that for  
3 the Record.

4 THE COURT: What do I do with that?

5 MR. SAMET: Well, the two facts are not --

6 THE COURT: No, I got that. But so what am I'm --

7 MR. SAMET: One of the two declared statements are  
8 false, Your Honor.

9 THE COURT: Okay.

10 MR. SAMET: That is just my --

11 THE COURT: Okay. All right. As to the unjust  
12 enrichment claim, let me just ask: Am I to construing it as a  
13 *quantum meruit* claim? Perhaps I need to have you technically  
14 re-plead it as such. I'm not sure about that.

15 But is that essentially what you're pleading?

16 MR. SAMET: Your Honor, first of all, under both  
17 Alaska *Millet* case --

18 THE COURT: Right.

19 MR. SAMET: -- and we said Texas law has an unjust  
20 enrichment claim. And Alaska, the case actually says, *quantum*  
21 *meruit*, unjust enrichment, they're all the same thing.

22 THE COURT: Okay.

23 MR. SAMET: They're used interchangeably. In Texas,  
24 what they call it, *quantum meruit*, we cited the case in our  
25 papers as well. We're pleading that it meets that standard,

1 or whatever you want to call it. And I did want to read it.  
2 In a sense it's useful. It's not just the eight paragraphs  
3 referenced by counsel, but this is described in some detail in  
4 paragraphs 89 to 95 of the compliant, where the parties are  
5 discussing, gee, we won't be able to get paid, so let's just  
6 give to them for free anyway. That's why there the business  
7 about Aurora, and Your Honor can look at that in this case.

8 THE COURT: Okay. All right. That's all I have.

9 Anything else that I haven't touched on? I think  
10 that's pretty comprehensive.

11 (No audible response.)

12 THE COURT: All right. I think an exceedingly well  
13 argument argued by everyone across, Mr. Samet, you get special  
14 commendation for being on your feet, half the time, responding  
15 to everybody. I guess Mr. Corn, you pitched in some there.  
16 But Mr. Samet, you did a fine job.

17 Thanks to everybody. It was really interesting  
18 arguments. And, it's going to take me at least 30 days to get  
19 an order out, but this will be something that I'll be working  
20 on. I know this case has been sitting for a little bit  
21 getting to this part -- point with so many different parties.  
22 But I intend to get you-all an opinion and Order as quickly as  
23 I can.

24 All right. Thank you all very much. We're  
25 adjourned.

1 (Proceedings adjourned at 4:28 p.m.)

2 \* \* \* \* \*

3 I certify that the foregoing is a correct transcript  
4 to the best of my ability produced from the electronic sound  
5 recording of the proceedings in the above-entitled matter.

6 /S./ MARY D. HENRY

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